TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~234.~~ 89

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, PLAINTIFF IN ERROR,

vs.

MARTIN LUCAS, TREASURER OF TIPPECANOE COUNTY, INDIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

FILED SEPTEMBER 2, 1874.

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a UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the supreme court of the State of Indiana, greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said supreme court, before you, between the board of commissioners of Tippecanoe County and Martin Lucas, treasurer of Tippecanoe County, in the State of Indiana, the said supreme court of Indiana being the highest court of law in the said State in which a decision could be had in said suit, a manifest error hath happened, to the great damage of the said The Board of Commissioners, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the day of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, this 25th day of June, A. D. 1874.

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsed:) 3603. Supreme Court U. S., December term, 1874. The Board of Commissioners of Tippecanoe County vs. Martin Lucas, treasurer. Writ of error. Filed Jun' 25, 26, 1874. Charles Scholl, clerk.

b UNITED STATES OF AMERICA, *ss:*

To Martin Lucas, treasurer of Tippecanoe County, Indiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error prosecuted from the Supreme Court of the United States & directed to the judges of the supreme court of the State of Indiana, wherein the board of commissioners of the county of Tippecanoe is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment mentioned should not be corrected, and speedy justice should not be done to the parties in this behalf.

Witness the honorable James L. Worden, chief-justice of the supreme court of the State of Indiana, this 14th day of July, 1874.

JAMES L. WORDEN.

c THE STATE OF INDIANA,
Tippecanoe County, ss:

Personally appeared before me, Daniel Royse, clerk of the Tippecanoe civil circuit court, in the State of Indiana, Samuel P. Baird, one of the attorneys for plaintiff in error named in the within citation, on the seventeenth day of July, A. D. 1874, who, being by me first duly sworn, upon his oath saith, that he served the within citation on Hiram W. Chase,

one of the attorneys of record for the defendant in error, and also on the defendant in error, Martin Lucas, on the day and year above-named, by reading said citation to each, and by leaving a copy thereof with each.

S. P. BAIRD.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in La Fayette, this 17th day of July, A. D. 1874.

[SEAL.] DANL. ROYSE, *Clerk.*
F. W. CHASE, *D. C.*

(Indorsed:) Supreme Court of United States. October term, 1874. The Board of Commissioners of the County of Tippecanoe vs. Martin Lucas, treasurer of said county. Citation.

d UNITED STATES OF AMERICA, *ss:*

To Martin Lucas, treasurer of Tippecanoe County, Indiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the *the* clerk's office of the said supreme court of Indiana, wherein the board of commissioners of Tippecanoe County is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment mentioned should not be corrected, and speedy justice should not be done to the parties in this behalf.

Witness the honorable James L. Worden, chief-justice of the supreme court of the State of Indiana, this 25th day of June, 1874.

JAMES L. WORDEN.

e THE STATE OF INDIANA,
Tippecanoe County, ss:

Personally appeared before me, Daniel Royse, clerk of the Tippecanoe civil circuit court, in the State of Indiana, Samuel P. Baird, one of the attorneys for plaintiff in error named in the within citation, on this first day of July, A. D. 1874, who, being by me first duly sworn, upon his oath saith, that he served the within citation on Hiram W. Chase, one of the attorneys of record for the defendant in error, and also on the defendant in error, Martin Lucas, on the day and year above named, by reading said citation to each, and by leaving a copy thereof with each.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in Lafayette, this 1st day of July, A. D. 1874.

[SEAL.] DANL. ROYSE, *Clk.*
F. W. CHASE, *Deputy.*

(Indorsed:) Supreme Court U. S., December term, 1874. The Board of Commissioners of Tippecanoe County vs. Martin Lucas, treasurer. Citation. Filed Jun' 25, 26, 1874. Charles Scholl, clerk.

1 STATE OF INDIANA:

In the supreme court.

Be it remembered that heretofore, to wit, on the 14th day of August.

A. D. 1873, a transcript of the record of the proceedings and judgment of the Tippecanoe circuit court, together with an assignment of errors endorsed thereon, was filed in the office of the clerk of the supreme court of said State, which transcript is in the words and figures following, to wit:

Pleas held before the honorable David P. Vinton, sole judge of the Twenty-third judicial circuit in the State of Indiana, within and for the county of Tippecanoe, in said State, and in vacation after the April term of the Tippecanoe civil circuit court, in the State of Inndiana, in the year of our Lord one thousand eight hundred and seventy-three, to wit:

2 THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY *vs.* MARTIN LUCAS, TREASURER OF SAID COUNTY. } Injunction.

Be it remembered that on the 10th day of July, A. D. 1873, the above-named plaintiff, by Wilson and Adams, Robert Jones, Z. & S. P. Baird, and Thomas B. Ward, her attorneys, filed in the office of the clerk of the Tippecanoe civil circuit court her complaint against the above-named defendant, which complaint reads in the words and figures following, to wit:

Complaint.

THE STATE OF INDIANA,
Tippecanoe County, ss:

Civil circuit court of said county, Sep. term, 1873.

The Board of Commissioners of Tippecanoe County complain of Martin Lucas, the treasurer of said county, and say:

That the plaintiff, under and by virtue of the act of the legislature of said State, approved May 12, 1869, and entitled "An act to
3 authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies, at divers times during the year 1871, 1872, & 1873, subscribed and paid for stock in the Lafayette, Muncie and Bloomington Railroad Company, a railroad corporation organized under the laws of said State, and engaged in building a railroad which passes through said county; that said company, at the times said subscriptions and payments were made, issued its stock-certificates to the plaintiff for a large number of shares of stock, to wit, (6,610) six thousand six hundred and ten shares of stock, of the par value of fifty dollars per share, and the plaintiff thereby became and is the owner of said stock.

That after the approval of the act of said legislature, approved December 17, 1872, & entitled "An act to require railroad companies to issue stock, paid for by taxes voted in aid of the construction of their railroads, to the tax-payers or their assignor, and to issue unclaimed stock for the benefit of the common-school fund, and declaring an emergency," and on or about the 17th day of May, 1873, and before the
4 defendant had issued to any individual a certificate such as is contemplated by the first section of said last-named act, the plaintiff requested the defendant to refuse to issue any such certificates,

unless under the direction of the proper court; that said defendant, disregarding said request, did, on or about the day of , issue such a certificate to Thomas Wood for the sum of dollars, and has since issued such certificates for various amounts and to divers persons, and threatens to continue to issue such certificates to all persons who may apply for the same who can show themselves entitled to demand the same under the provisions of said last-named act.

The plaintiff further says that the said State had not nor has it the power to take the said stock, or any part of it, from the plaintiff, nor the power to give it to individuals for their private benefit, and that the issuing of said certificates by said defendant is illegal; that, though illegal, yet the issuing of said certificates is recognized by said company as depriving the plaintiff of its stock in said company to the
5 extent of the amount covered by said certificates, and the holders of said certificates claim to be substituted to the rights of the plaintiff as shareholders in said company to the amounts covered by their respective certificates, and said company recognizes said claim.

That by the issuing of said certificates the rights of the plaintiff to said stock is made questionable, and a cloud is cast upon its title thereto, and the market-value of all the stock so held by the plaintiff is being destroyed, and the plaintiff is being deprived of the rights in the said company which it is entitled to have and exercise as the owner of said stock, at least to the extent of the amounts specified in the certificates issued by said defendant, and will be deprived of such rights to the extent of any such certificates hereafter issued by the defendant, and there is danger that such certificates will be issued to a large amount by the defendant, if he is not restrained from so doing by the order of this court, and very great injury will thereby be done to the plaintiff.

6 The plaintiff asks the following relief: That by the order of the court the defendant be enjoined from issuing any certificate or certificates, such as contemplated by the first section of the last-named act, to any person or persons, until the final hearing of this cause, or until the further order of the court, and that on the final hearing said injunction be made perpetual, and that such other and further relief be granted the plaintiff as may be just and equitable.

WILSON & ADAMS,
ROBERT JONES,
Z. & S. P. BAIRD,
THOS. B. WARD,
Attys. for Plff.

THE STATE OF INDIANA,
Tippecanoe County, ss:

Personally appeared before the undersigned, clerk of the Tippecanoe civil circuit court, on this day of July, 1873, Joseph S. Stockton, a member of the board of commissioners of Tippecanoe County, and, after being by me first duly sworn, upon his oath saith, that the mat-
7 ters and things stated in the foregoing complaint are true, as he verily believes; and further saith not.

JOSEPH T. STOCKTON.

Subscribed and sworn to this 10th day of July, 1873.

DANIEL ROYSE, *Clk.*
D. WATERBURY, *Dept.*

And afterwards, to wit, on the 17th day of July, A. D. 1873, the following "notice of the plaintiff's application for a restraining order," with the sheriff's return endorsed thereon, was filed in the office of the clerk of the Tippecanoe civil circuit court, to wit:

Notice.

In the Tippecanoe civil circuit court of Sept'r term, 1873.

THE BOARD OF COMMISSIONERS OF TIPPECANOE County
vs.
MARTIN LUCAS, TREASURER OF TIPPECANOE County. } Complaint for injunction.

The said defendant, Martin, Lucas, is hereby notified that the said plaintiff will, on the 17th day of July, 1873, apply before the Hon.
8 D. P. Vinton, sole judge of the said Tippecanoe civil circuit court, at the office of the clerk of said court, in the said county of Tippecanoe, in the city of Lafayette, in said county, for a temporary order of injunction in the above-entitled cause.

WILSON & ADAMS,
ROBT. JONES,
Z. & S. P. BAIRD,
THOS. B. WARD,
Attys. for Plffs.

Return.

Served this notice by reading and leaving a true copy to Martin Lucas, treasurer of Tippecanoe County, July 10th, 1873.

JAMES MURDOCK, *Sheriff.*
A. McGOVERN, *Dept.*

And afterwards, to wit, on the 24th day of July, A. D. 1873, and in vacation, after the April term of the Tippecanoe civil circuit court, in the county of Tippecanoe, in the State of Indiana, before the honorable David P. Vinton, judge of said court, the following proceedings were had and entered of record in said cause, to wit:

THE STATE OF INDIANA,
Tippecanoe County, ss:

9 In the Tippecanoe civ. cir. court, September term, 1873.

THE BOARD OF COMMISSIONERS OF THE county of Tippecanoe
vs.
MARTIN LUCAS, TREASURER OF SAID county.

This 17th day of July, 1873, comes the plaintiff, by its attorneys, and also comes the defendant, by Chase and Wilstach, Coffroth and John L. Miller, his attorneys, and it appears to the satisfaction of the court that due and proper notice had been given the defendant of the time and place at which an application would be made for an injunction in this case.

And thereupon the plaintiff moves the court to grant a temporary injunction herein, in accordance with the prayer of the complaint, which motion is submitted on the complaint and the affidavit thereto, no other affidavit being filed by either party. After full argument by the attorneys of the parties, the case is taken under advisement on the 19th day of July, 1873, and now on this, the 24th day of July, 1873, come the parties, by their attorneys, and thereupon it is ordered
10 that the defendant be and is hereby enjoined from issuing any certificate or certificates to any person or persons such as he is required to issue to tax-payers by the act of the general assembly of the State, approved December 17th, 1872, and entitled "An act to require railroad companies to issue stock paid for in aid of the construction of their railroads to the tax-payers or their assignees, and to issue unclaimed stock for the common-school fund, and declaring an emergency."

Said injunction to remain in force until the next term of the Tippecanoe civil circuit court and until the further order of said court.

The plaintiff to give an undertaking as prescribed by statute.

And there'pon the plaintiff presents for approval such undertaking, executed by Oliver H. Pearce and John W. Heath, and the defendant waives all objection or exception to said undertaking, and consents that it be approved, and there'pon said undertaking is approved; which undertaking reads as follows, to wit:

Undertaking.

THE STATE OF INDIANA,
Tippecanoe County:

In Tippecanoe civ. cir. court, Sep. term, 1873.

11 THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY *vs.* MARTIN LUCAS, TREASURER OF SAID COUNTY. } An undertaking.

We undertake that the plaintiff, The Board of Commissioners of Tippecanoe County, shall pay to the defendant, Martin Lucas, treasurer of said county, all damages and costs which may accrue by reason of the injunction in this action.

This 24th day of July, 1873.

OLIVER W. PIERCE.
JOHN W. HEATH.

Approved by me this 24th day of July, 1873.

D. P. VINTON, *Judge.*

To which granting of an injunction the defendant now excepts, and the defendant prays an appeal to the supreme court, which is granted upon filing an appeal-bond in the clerk's office, conditional according to law in the penal sum of one thousand dollars, with Adams Earl as surety thereon, who is approved by the court.

The penalty being fixed at that sum by consent of the plaint-
12 iff, the defendant having given the plaintiff his undertaking not to issue said certificates until authorized by some action of the supreme court.

DAVID P. VINTON, *Judge.*

Appeal-bond.

And on the said 24th day of July, 1873, the following appeal-bond was filed, to wit:

Know all men by these presents that we, Martin Lucas and Adams Earl, are held and firmly bound unto the board of commissioners of the county of Tippecanoe, in the State of Indiana, in the penal sum of one thousand dollars; for the payment of which we bind ourselves and legal representatives firmly by these presents, signed and sealed by us this 24th day of July, A. D. 1873.

The condition of this obligation is such that whereas said Martin Lucas has this day prayed an appeal from the order of the Hon. David P. Vinton, judge of the civil circuit court of Tippecanoe County, Indiana, in a certain cause wherein said board of commissioners of the county of Tippecanoe, were plaintiffs, and said Lucas defendant, whereby said Lucas, as the treasurer of said county, was enjoined and restrained
13 from issuing to the tax-payers of said county, or any of them, any receipts or certificates as required by the provisions of "An act to require railroad companies to issue stock paid for by taxes voted in aid of the construction of their railroads to the tax-payers, or their assignees, and to issue unclaimed stock for the benefit of the common-school fund, and declaring an emergency," approved December 17th, 1872; from which order granting said injunction said Lucas has prayed an appeal to the supreme court of said State.

Now, if said appellant shall duly prosecute said appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against him, then this obligation to cease; else remain in force.

MARTIN LUCAS. [SEAL.]
ADAMS EARL. [SEAL.]

Taken and approved by me this 24th day of July, A. D. 1873.
DAVID P. VINTON, *Judge.*

14 *Clerk's certificate.*

THE STATE OF INDIANA,
Tippecanoe County, ss:

I, Daniel Royse, clerk of the Tippecanoe civil circuit court, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record of the proceedings had in the above and foregoing entitled cause, as the same appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in Lafayette, on this 28th day of July, A. D. 1873.

[L. S.] DANIEL ROYSE, *Clerk.*

15 In the supreme court of Indiana, May term, 1873.

MARTIN LUCAS
vs.
THE BOARD OF COMMISSIONERS OF TIPPECANOE County. } Appeal from the Tippecanoe civil circuit court.

Comes the appellant, by Coffroth & Chase & Wilstach, his attorneys,

and says there is manifest error in the record of the proceedings in this cause in this, to wit:

The court erred in granting an injunction to the plaintiff against the defendant.

Wherefore the appellant prays judgment of reversal.

J. R. COFFROTH &
CHASE & WILSTACH.
Attorneys for Appellant.

And at the same time comes the appellee and enters her appearance in the following, to wit:

In mille est eratum.

WILSON & ADAMS,
Z. & S. P. BAIRD,
ROBT. JONES, &
THOMAS B. WARD,
For Appellee.

16 *Submission.*

STATE OF INDIANA,
Supreme Court:

MARTIN LUCAS
vs.
THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

And afterwards, to wit, on the 26th day of November, A. D. 1873, came the parties, by their attorneys, and by agreement this cause is submitted to the court upon the record, assignment of errors, and briefs on file.

And afterwards, to wit, on the 9th day of December, A. D. 1873, came the appellant, by his attorneys, and filed his motion and petition, and thereupon moved the court to advance said cause upon the docket of said court; and said motion and petition are in the words and figures following, to wit:

17 *Motion to advance.*

In the supreme court of Indiana, November term, 1873.

MARTIN LUCAS
vs.
THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.

The appellant respectfully petitions the supreme court to advance this cause upon its docket and hear an oral argument and render a speedy decision therein, for the following reasons: 1. Said cause is of general and public interest, and involves the rights of a very large number of tax-payers throughout the State to stock in railroad companies for which they have been assessed and paid taxes levied under the act of May 12th, 1869. 2. By the terms of the act of December 17th, 1872, (laws of special session 1872, p. 54–6,) tax-payers will lose their right to stock

on the 1st of January, 1874, unless their rights thereto shall be settled by the supreme court prior to that time.

Wherefore the appellants respectfully asks said cause be advanced and speedily heard and determined.

December 9th, 1873.

J. R. COFFROTH,
CHASE & WILSTACH,
Attys. for Appellant.

18 And the court being sufficiently advised in the premises, it is ordered that said cause be advanced upon the docket.

And afterwards, to wit, on the 17th day of March, A. D. 1874, the following proceedings were had in said cause, to wit:

19 THE STATE OF INDIANA:

In the supreme court, November term, 1873.

On the 11th day of March, 1874.

Present: The Hon. Alexander C. Downey, C. J.; James L. Worden, Samuel H. Buskirk, John Pettit, Andrew L. Osborn, judges.

IN THE CASE OF MARTIN LUCAS *vs.* THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY.	Appeal from the Tippecanoe civil circuit court.

Came the parties, by their attorneys, and the court being sufficiently advised in the premises, gave the following opinion and judgment, pronounced by Downey, Chief-J.:

Under the act of the legislature of this State, entitled "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies," approved May 12th, 1869, (acts of 1869, page 92,) and in alleged conformity to that act, a tax was voted and collected in Tippecanoe County in aid of the Lafayette, Muncie and Bloomington Railroad Company, and

20 during the year' 1871, 1872, and 1873, the commissioners of the county subscribed and paid for stock in said company to the amount of six thousand six hundred and ten shares, of the par value of fifty dollars per share, and the company issued to the county certificates of stock therefore.

After the passage and approval of the act of December 17th, 1872, entitled "An act to require railroad companies to issue stock paid for by taxes voted in aid of the construction of their railroads, to the taxpayers or their assignees, and to issue unclaimed stock for the benefit of the common-school fund, and declaring an emergency," and before the treasurer had issued to any person a certificate, such as is contemplated by the first section of said act, the commissioners requested the treasurer not to issue any such certificates unless under the direction of the proper court. The treasurer disregarded this request and issued a number of such certificates to different persons, and threatens to continue to issue to all persons who might apply for them, and who could show themselves entitled to demand the same under said last-mentioned act.

Upon a complaint by the commissioners against the treasurer,

21 representing substantially the above facts, an injunction was granted by the judge of the circuit court enjoying the treasurer from issuing any certificate or certificates to any person or persons such as he is required to issue to tax-payers by the act of December 17, 1872, the injunction to remain in force until the next term of the Tippecanoe circuit court and until the further order of the court.

From this order of the court the treasurer appealed to this court, and he has assigned as error the granting of the injunction.

In the first section of the act of December 17, 1872, it is enacted that in all cases where stock has been taken by counties or townships in railroad companies, and paid for from taxes levied and collected under the provisions of the act of May 12th, 1869, it shall be the duty of the treasurer of the proper county upon request, if made prior to the first day of January, 1874, to issue to the several tax-payers and to the personal representatives of such as may have died, a certificate stating the amount of the railroad tax paid by such tax-payer, the date of payment and the name of the railroad company in aid of which the tax was levied
22 and paid, as the facts shall appear from the proper tax duplicate and record in his office.

In the second section it is provided that when taxes have been or shall be levied in accordance with the provisions of said act, which shall thereafter be paid, the treasurer of the proper county shall give to the person paying such railroad tax a special receipt therefor, in which the facts shall be stated as in case of a certificate being given as required in the preceeding section.

The third section declares that the certificates and receipts provided for in the first and second sections of the act, shall be assignable in writing, and any lawful holder thereof may present and surrender said certificate at any time prior to January 1, 1874, and may present and surrender the said receipts to the proper railroad company at any time within four years after the tax for which they were given was paid, in sums equal in amount to any number of shares in the capital stock of such company; and it shall be the duty of such company to issue a certificate of paid-up capital stock therein to the amount of the certificates and receipts so surrendered; provided, that the company shall
23 not be compelled to issue such certificates of stock to an amount greater than the money it shall have received from the county or township, as the case may be, together with the expenses of the election to be paid by such railroad company under the provisions of the act of May 12, 1869; Provided, that the stock so issued under the provisions of this act being involuntary in its character, no personal liability shall attach to the original holder thereof for any debt contracted by the railroad company.

By the fourth section it is made the duty of the auditors of the several counties in which railroad taxes may have been collected and paid over for stock under the provisions of the act of May 12, 1869, immediately after the expiration of the times for the surrender of certificates and receipts by individuals to railroad companies, as fixed in the preceding section, to ascertain from the books of the county treasurer, and the books of the proper railroad company, which he shall have the right to examine for that purpose, what amount of stock has been paid for by taxes levied in the county or any township, as the case may be, which has not been applied for by individuals upon the surren-
24 der of such certificates and receipts as aforesaid, within the times limited for that purpose; and for such amounts of unclaimed stock the proper railroad company shall, upon the request of such audi-

tor, issue to the several civil townships in such county certificates of stock in proportion, as nearly as may be, to the number of children in such townships between the ages of six and twenty-one years, as shown by the last preceeding enumeration for school purposes; which stock, with all dividends thereon, shall be for the use of the public schools of such township, and be a part of the school fund of such townships; provided, that if such unclaimed stock shall have been purchased by tax voted in one or more townships and not in the whole county, the township or townships in which the same was paid shall alone be entitled to said unclaimed stocks, to be apportioned in case of more than one township in manner aforesaid, upon the basis of the number of children between the said ages of six and twenty-one years.

According to the fifth section, the issuing of stock to individ-
25 uals or townships, for school purposes, by railroad companies, as provided for in this act, shall operate to cancel, pro tanto, the stock held by any county or township under the provisions of the act of May 12, 1869, and all stock standing in the name of any township or county shall be the property of the individuals paying therefor and of the several townships for school purposes, as the case may be, after individuals entitled thereto shall fail to apply therefor during the time above limited for that purpose. By the sixth section townships are authorized to vote the stock held by their respective townships in all meetings of stockholders of the companies by which the stock was issued, and all stock held under the provisions of this act shall entitle the holder thereof to all the rights and privileges of stockholders who may have personally subscribed and paid stock in such railroad companies.

The last section declares that an emergency exists for the immediate taking effect of the act, and that the same shall be in force and take effect from and after its passage.

The question presented is as to the constitutionality of the act
26 which we have set out, the act of December 17, 1872.

It is urged by counsel for the appellees that the legislature has not the power to pass a law to take the railroad stock from the county after it has been subscribed and paid for by the county, out of the fund raised by taxation, and transfer it to those from whom the money was collected; and in the event that they do not apply for it, to vest it in the townships for school purposes. Only so much of the act as attempts to divest counties and townships of stock already subscribed and paid for at the passage of the act is brought in question in this case. So much of it as relates to stock subscribed or to be subscribed, after the passage of the act is not in question. Counsel raise no question as to the form of the action, the manner in which the question is presented, or as to the parties to the action. The constitutionality of the act in its application to the facts in this case is the only question discussed or presented.

Were this a question relating to the power of the legislature to dispose of the property of a private corporation as it it has disposed or attempted to dispose of the property of the counties and
27 townships by this law, there would probably be no ground for hesitation in declaring the law to be a violation of the constitution. Counties and townships, however, are not private corporations, and the rules of law applicable to them are not in all respects the same as those which are applicable to private corporations. They are not created by special charter, as is generally or frequently the case with private corporations. They exist under general laws enacted by the

legislature, by which the territory of the State is divided into political divisions as the convenience of the government may suggest and require, and the people falling within such divisions have such rights, are required to perform such duties, and conform to such regulations as may be prescribed. This makes it convenient, if not necessary, that corporate powers greater or less in extent shall be conferred upon them. Whether they shall have those rights, assume those duties, or conform to those regulations, they are not allowed to determine. The legislature creates the divisions, either directly or by conferring power for that purpose upon some court or tribunal. When thus created they are
28 required to perform the duties and to submit to the burdens imposed by the legislature, or by the court or tribunal upon whom authority for such purpose may be conferred by the legislature. Their functions are of a public nature, designed for local self-government, and there is. therefore, no room, as there may be in case of private corporations, to imply any contract between them and the State in their organization as corporate bodies, except such as may arise from ordinary considerations of good faith. Hence, where there is no constitutional prohibition the legislature may at its pleasure, and as the exigencies of the case may suggest or require, change the boundaries of counties and townships, alter or change the law relating to them, and may even abolish entirely such corporations, either directly or by conferring the power to do so upon some court or tribunal designated for that purpose. But the question here is, can the legislature, while such a corporation remains in existence, take from it property which has been thus vested in it by authority of law and transfer the ownership to another. It
29 may be stated as a general proposition that the property owned by the counties and townships is derived or results from the taxation of the property and polls of the county or township. There are exceptions to this rule, for instances could be named where property is acquired by such corporations by means other than taxation. In this instance, however, the money with which the railroad stock was purchased was obtained from the people of the county by taxation exclusively, and the object of the law in question is to return to them, so far as is practicable, the property in its new form, in the same proportions in which it was obtained from them. Assuming that the stock, if the county shall continue to own and hold it, will yield a revenue to the county treasurer, it may be presumed that, to this extent, the taxes which it may be necessary in the future to levy for county purposes will be diminished, and that, therefore, to most of those who have paid the money it will make no material difference whether the county shall hold the stock or those who paid the money with which it was purchased.

But as taxation in the future must necessarily be different from what it was when the money was collected, on account of change of residences, transfers of property by sale, by death, & etc., the differ-
30 ence between the two modes of ownership of the property is quite apparent. And then, what may be of some moment, the right to represent the stock in voting at elections, by which the management of the affairs of the railroad company may be controlled, may be of considerable interest and importance. Whether this power shall be given to the commissioners, or vested in those who furnished the money with which the stock was purchased, may be very important. It has been said by an eminent modern law writer, that the legislative power of the State controls and disposed of the property of the State. How far it can also dispose of that of those agencies of government which it has created and endowed with corporate powers, is a ques-

tion which, happily, there has been very little occasion to discuss in the courts. Being a mere agency of government, it is evident that the municipality cannot itself have that complete and absolute control and power of disposition of its property which is possessed by individuals over their own. For it can hold and own property only for corporate purposes, and these purposes are liable at any time to be so modified by legislation as to render the property no longer available; moreover, the chartered rights may be altogether taken away, and in that case
31 the legislature has deprived the corporation of its property by depriving it of corporate capacity to hold it. And in many ways, while the corporation holds and enjoys property, the legislature must possess power to interfere with its control, at least incidentally; for the mere fact that the corporation possesses property cannot deprive the State of its complete authority to mold and change the corporate organization, and enlarge or diminish its powers, which it possessed before. But whether the State can directly intervene and take away the corporate property, or convert it to other uses than those for which it was procured, or whether on repealing a charter of incorporation it can take to itself the corporate property, and dispose of it at its discretion, are different questions from any raised by the indirect and incidental interferences referred to. Cooley, Const. Lim., 235.

When the municipal divisions of the territory of the State are changed in their boundaries, two or more consolidated into one, or one is subdivided, the legislature possess the power to make such disposition of the corporate property as equity and justice may require in view of the changes made. Id., p. 336. The State v. Valoni, 8 Blackf.,
2. Lore v. Schenck, 12 N. C., Iredell, 304. The Town of Milwaukee The City of Milwaukee, 12 Wis., 93.

32 Judge Cooley, in the summing up of his views on the question as to the power of the legislature over the property of municipal corporations, says:

"The rule upon the subject seems to be this: when corporate powers are conferred there is an implied contract between the State and the corporators that the property which they have the capacity to acquire under their charter shall not be taken from them and appropriated to other uses. If the State grants property to the corporation, the grant is an executed contract which cannot be revoked. The rights acquired either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights and cannot be taken away. Nevertheless, when the corporate powers are repealed the corporate ownership ceases, and by modification of corporate powers the legislature may in other cases affect and divest the rights of individual corporations, so far as they can be said to have any rights in public property; and in other ways and by direct intervention the legislature may exercise control over the disposition and use of property, subject to the restriction that it must not be diverted to a substantially different purpose from that for which it was acquired." Page 237.

33 The case of Darlington v. The Mayor, &c., of New York, 31 N. Y., 164, was an action under a statute of that State against the city to recover the value of certain personal property which had been destroyed in consequence of a riot, and the questions to be decided were as to the constitutionality of the law, and the power of the legislature to make the property of the city liable to the payment of the judgment in such case. The law was held constitutional and it was held that the legislature had the power to render the property of the city liable to

such judgments as judgments recovered for any other cause of action, and also that the property owned by the city corporations was held by it as a public corporation and was subject to the law-making power of the State vested in the legislature. Denio, C. J., in delivering the opinion of the court said: "City corporations are eminations of the supreme law-making power of the State, and they are established for the more convenient government of the people within their limits. In this respect corporations chartered by the Crown of England and confirmed at the Revolution stand on the same footing with similar corporations created by the legislature. Their boards of aldermen and councilmen
34 and other officers are as truly public officers as the boards of supervisors or sheriffs and clerks of counties; and the property entrusted to their care and management is as essentially public property as that confided to the administration of similar official agencies in counties and towns.

In cities, for reasons partly technical, and in part founded upon motives of convenience, the title is vested in the corporate body. It is not therefore shielded from the control of the legislature, as the supreme law-making power of the State. Let us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like. No one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds to be devoted to municipal or other public purpose, within the city, as a court-house, or a hospital, or the like; and yet, if the argument on behalf of the defendants is sound, it would be the taking of private property for public use without compensation, and the act would be void." And, again, the learned judge says: "The view of the argument of the defendant is, that it assimilates
35 the condition of the city in respect to the property to which it has title to that of an individual or a private corporation, and denies to the legislature any power over it which it would not possess over the fortunes of a private citizen."

In The State of Maryland, &c., v. The Baltimore and Ohio Railroad Co., 3 How., 534, the validity of an act of the legislature of Maryland was in question.

The State in 1836 passed a law directing a subscription of three millions to be made to the capital stock of the Baltimore and Ohio Railroad Company, with a proviso that, if the company should not locate the road in the manner provided for in the act, they should forfeit one million dollars to the State of Maryland for the use of Washington County. In March, 1841, the State passed another act, repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same. It was adjudged that the proviso was a measure of State policy, which it had a right to change if the policy was afterwards discovered to be erroneous, and neither the commissioners or the county nor any
36 one of its citizens acquired separate or private interest under it which could be maintained in a court of justice. It was held to be a penalty inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter, was not sufficient to deprive it of the character of a penalty; that, being a penalty imposed by law the legislature had a right to remit it. East Hartford v. Hartford Bridge Co., 10 Howard, 50, is also cited.

The town of Hartford owned a ferry over the Connecticut River from 1681 to 1783, at which time the legislature incorporated the town of East

Hartford, and granted to it one-half of the ferry during the pleasure of the general assembly. In 1808 a company was incorporated to build a bridge across the river, which, being erected, was injured and rebuilt in 1818, when the legislature resolved that the ferry should be discontinued. It was urged that this last act of the legislature was in violation of the clause of the Constitution of the United States which forbids the States from passing any law impairing the obligation of contracts. But it was held that the public character of all the parties to the grant
37 no less than its subject-matter showed that nothing in the nature of a contract existed in the case so as to prevent subsequent interference with the matter by the legislature, as the public interest might seem to require.

It was also held that the town of East Hartford held the ferry-right only during the pleasure of the general assembly.

In The County of Richland v. County of Lawrence, 12 Ill., 1, the question was this: Under a statute relating to internal improvements a certain sum of money had been paid to Lawrence County as one of the counties that had by the law no railroad or canal passing through it. Richland County was created by detaching territory from Lawrence and Clay Counties. After the county of Richland was created, the legislature passed a law directing that Lawrence County should pay out of the fund so received to Richland County, such proportion of the fund as the population of Richland County, or that part of the territory taken from Lawrence County, as compared with the whole population, should show Richland County entitled to. It was urged that the statute making such divisions was in violation of the clause in the Constitution of the United States forbidding the passage of any law by a State im-
38 pairing the obligations of contracts. But it was held that the statute was not liable to the objection. Turnbell, J., in delivering the opinion of the court, used this language: "The money, in this instance, was appropriated out of the funds received by the State for the purpose of internal improvement, and was directed to be drawn and expended by the county officers in a particular manner. Before its expenditure we cannot doubt that the legislature had entire control over the fund, either to resume it altogether or to change the purpose for which it was originally designed to be expended. There was no contract here between the State and Lawrence County either at the time the appropriation was made or when the county received the money. The county was the mere agent of the State for the disbursement of a certain amount of the money of the State as she directed." The money was, by the act, to be expended in the improvement of roads, construction of bridges, and other public works. The judge proceeds: "That the State may make a contract with or a grant to a public municipal corporation which it could not subsequently impair or resume is not denied; but in such case the corporation is to be regarded
39 as a private company. A grant may be made to a public corporation for purpose of private advantage, and although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing as regards such grant as would any body of persons upon whom like privileges were conferred. Public or municipal corporations, however, which exist only for public purposes and possess no powers except such as are bestowed upon them for public political purposes, are subject at all times to the control of the legislature, which may alter, modify, or abolish them at pleasure. 2 Kent's Com., 305; Bailey v. City of New York, 3 Hill, 531."

In Dennis v. Maynard, 15 Ill., 477, the question was as to the valid-

ity of a law by which a tax was imposed to pay a debt incurred in the erection a bridge and to keep the bridge in repair in a certain precinct. It was objected that the act was judicial and not legislative. The act was held valid. The court said, Scotes, J., delivering the opinion: "The State does not allow itself to be sued, but it may hear, investigate, and determine its own indebtedness, and assume the debts due to or from others; so it may direct the county authorities to ascertain and allow just claims upon the public treasury, or may ascertain and fix that amount, and direct the raising of means by taxation for its payment. The public, county, and township funds are under legislative control, and so decided in The County of Pike v. The State, 11 Ill. R., 202, and The County of Richland v. The County of Lawrence, 12 Ill. R., 1.

These local municipal corporations are created for convenience in the police arraingements, but their powers and duties remain subject to the public will, through the legislative body. Under these views and principles we perceive no objection interposed by the constitution, or of private or vested rights, to a legislative direction to refund moneys advanced for the public use, or to the purchase of private property for their accommodation. I am speaking of the question of legislative power, and as to this I can perceive no lack in their direction, even to lay a tax for the part as well as the whole bridge.

In State ex rel. vs. The County Court, &c., 34 Mo., 546, an act of the legislature was in question which directed the appropriation of a large sum of money, which had been raised by taxation by the county to pay a portion of the police expenses of a city within its limits. The act was held valid. Bates, J., said: "The money belongs to the county by virtue of acts of the general assembly, and is expended under the direction of the same authority. The counties are subdivisions of the State, in which some of the powers of the State government are exercised by local functionaries for local purposes, in this instance and generally the functionary being the county court. The funds of the county are not strictly private property. They certainly do not belong to the citizens who may have contributed them. They are rather public property; the property of the State acquired from the people, and the property in the county, and to be used and expended for the benefit of the same people and property. The general assembly, having the legislative power of the State, determines to what local uses the county funds shall be applied. Its determination and direction may operate unwisely, hars'ly, and unjustly, but that is no argument against its power to direct. It authorizes and causes the funds to be collected, and requires their expenditures for purposes which it determines to be of local interest and benefit, and its determination is final. The judiciary cannot review this determination of the legislative power; cannot inquire whether the legislature, in directing an expenditure of county funds, judged correctly or not as to its being for the accomplishment of an object of interest or advantage to the inhabitants of the county. In the present case the legislature has thought proper to direct that the county of St. Louis shall pay one-fourth of the expense of a police in the city of St. Louis, which is wholly within and forms a part of the county of St. Louis. This court cannot say that this is not a legitimate use of county funds, or that it is a taking or application of private property to public use without just compensation, and certainly it is not an application of property to private use, for the police commissioners are an agency of the State government, and required to perform, within a specified locality, some of the most important duties of the government."

Further on, in disposing of another point made in the case, the learned judge says: "The county is not a private corporation, but an
43 agency of the State government, and though as a public corporation it holds property, such holding is subject, to a large extent, to the will of the legislature. Whilst the legislature cannot take away from a county its property, it has full power to direct the mode in which the property shall be used for the benefit of the county."

The case of Green v. Wussenberg School District, 37 P. St., 433, involved the validity of a law for the collection of assessments on persons and property to pay bounties. Green paid his taxes under protest, and afterwards sued to recover the amount back. While the suit was pending, an act was passed curing certain defects in the assessment. This law was also in question. The court held the act valid, and that Green was not entitled to recover. Sharswood, J., among other things, said: "The legislature cannot impair the obligation of a contract, or pass an ex-post facto law, for both these are expressly forbidden. Retrospective laws and State laws divesting vested rights, unless ex-post facto, or impairing the obligation of contracts, do not fall within the prohibition contained in the Constitution of the United States, however repugnant they may be to the principles of sound legislation."

In the Town of Milwaukee v. The City of Milwaukee, 12 Wis.,
44 93, it was decided that the legislature had not the power, either directly or indirectly, to divest a municipal corporation of its private property without the consent of its inhabitants.

The City of Louisville v. The President, &c., of *of* the University of Louisville, 15 B. Mon., 642, involved the question to what extent the legislature could control the property rights of the city. It was said, "The city of Louisville, though itself a civil institution, created to be employed, to some extent, as an instrument of government, was not and is not the government itself, but a distinct, though subordinate being; and although as a public corporation it holds its existence, and its peculiar forms and faculties, at the will of the government, of which it is an instrument or in some sense a part, it is not so identified with it that all its acts and acquisitions must necessarily be ascribed to the government, or enure to its benefit, either in point of interest or of power. Louisville might hold property for herself and her corporation. She might contract with individuals or other corporations with respect to her peculiar interests, and might certainly contract with the
45 State, and, even if abolished as a corporation, the State would not thereby become the beneficial proprietor of her rights of property or contract, but these would remain subject to the uses for which she had lawfully acquired or appropriated them."

In Wisconsin v. The Board of Education of Oshkosh, 22 Wis., 660, it was decided that money raised in a city by taxation, for the purpose of erecting a high-school building, could not be lawfully diverted by an act of the legislature, without the assent of the city or its inhabitants, to the purchase of a cite for a normal school in the same city.

After land had been taken for a road, and paid for by the public, it was held that it could not, by act of the legislature, be taken from the public and donated to the former owner, without any consideration paid therefor. When the town authority had taken the land for the purpose of a highway, and paid the proprietor therefor, the right to the easement became a vested right in the public, and, the public having received the land and the proprietor the compensation, it became a
46 fixed contract between them, and the provision of the Constitution of the United States, declaring that "No State shall pass any

law impairing the obligation of contracts," applied. The People, &c., v. The Commissioners of Highways, &c., 53 Barb., 70.

Whether counties stand on an equality with cities and towns as corporations may be doubtful. If they do not, then the cases cited in which cities and towns were the corporations whose rights and powers were in question would not be strictly applicable to the case which we are considering.

Judge Story says: "There is no doubt, as to public corporations, which exist only for public purposes, that the legislature may change, modify, enlarge, and restrain them; with this limitation, however, that property held by such corporation shall still be secured for the use of those for whom and at whose expense it has been acquired." (Story on the Constitution, vol. 2, sec. 1393.) The same language in substance was used by the same learned judge in Terrett v. Taylor, 9 Cranck, 43, and this language was referred to in Edwards v. Jaggers et al., 19 Ind., 407; but neither of these cases involved the question concerning the
47 power of the legislature over the property of a county or any other municipal corporation, as the case in Cranck related to the property of an ecclesiastical corporation, and that in 19 Ind. related to a private corporation for educational purposes. The Dartmouth College Case, 4 Wheaton, 518, is also referred to. That, however, was a case, as nearly every lawyer knows, concerning a corporation for educational purposes, and the case was decided on the ground that the charter was so much in the nature of a contract that it could not be altered by the legislature. The court, therefore, could have decided nothing relating to municipal corporations. It may be well to state, in view of these authorities, and as applicable to all cases decided by any court, that the language used in an opinion is always to be restricted to the case before the court, and the decision is only authority to that extent. The reasoning, illustrations, and references contained in the opinion of a court are not authority, not precedent; but only the points arising in the particular case, and which are decided by the court. The members of a court often agree in a decision, but differ widely as to the reasons or principles by which their minds have been led to a common conclusion. It is, therefore, the conclusion only, and not the process by which it has been reached, which is the decision of the court, and which has the form of precedent in other cases.

The reasoning adopted, the analogies and illustrations presented, in real or supposed cases, in an opinion, may be used as argument in
48 other cases, but not as authority. In these the whole court may concur or they may not. So of the principle concurred in and laid down as governing the point in judgment, so far as it goes or seems to go beyond the case under consideration. If this were not so, the writer of an opinion would be under the necessity in each case, though his mind is concentrated upon the case in hand and the principle announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, exceptions, limitations, and qualifications which every variety of facts and change of phase in causes might render necessary. (Louisville, &c., Co. v. The County Court, &c., 1 Sneed, 637.)

Of all the cases cited on both sides of this case—and we have examined them all—there is not one exactly like this one. The principles enunciated in the cases and by the authorities cited are so at variance that we are little better prepared to decide the case than when we commenced the examination of the authorities. It being conceded that the legislature may change, modify, enlarge, or wholly abolish public municipal corporations when not restrained by constitutional provisions,

it is not easy to fix the exact limits, if there be such limits to the legislative power, over the property of such corporations. None of the authorities to which we have referred deny the power over the property of such corporations, but most of them hold, to use the language of Judge Story, "that property held by such corporations shall still be secured for the use of those for whom and at whose expense it has been acquired." Who is to decide whether the new use to which the property is applied by the legislature is in violation of this restriction or not?

Judge Bates, in The State v. St. Louis, supra, says: "The general assembly, having the legislative power of the State, determines to what local uses the county funds shall be applied. Its determinations and direction may operate unwisely, harshly, and unjustly, but that is no argument against its power to direct. It authorizes and causes its funds to be collected, and requires their expenditure for purposes which it determines to be of local interest and benefit, and its determination is final. The judiciary cannot review this determination of the legislative power, cannot inquire whether the legislature, in directing an expenditure of county funds, judged correctly or not as to its being for the accomplishment of an object of interest or advantage to the inhabitants of the county."

Can anything be urged against the justice of this law? The money with which the stock was purchased was paid by all the tax-payers of the county. The law proposes to return it to them in the same proportions in its new form, or, if they do not apply for it, to vest it in the township for school-purposes, a purpose clearly of a public nature. He who paid most is to own most. No provision could be more just and equitable. It would, in some respects, operate unjustly to retain the stock as a county fund to very many who had paid the money with which it was purchased. The population of a county is constantly fluctuating. One man who had paid a large part of the tax removes and another who had paid none comes into the county, in which case the one who had contributed nothing would have all the advantage of the stock or fund, which might relieve him from county taxes, and would also have the use of the road which was built by it, and the other who had paid for the benefit would be entirely deprived of it. The distribution of the stock avoids this injustice, as the tax-payer receives a share of the stock equal to the amount of money paid by him, which, as his personal property, he may carry with him wherever he may go. (See The Louisville and Nashville Railroad Co. vs. The County Court of Davidson County, supra.)

It is expressly decided in this case that when there was a provision in the act by which the tax was authorized and the stock subscribed, directing the issuing of the stock to those who paid the tax in proportions in which they contributed the money with which it was purchased, that such provision was valid, and not liable to any constitutional objection. The part of the act in question in that case relating to the distribution of the stock among those paying the taxes is very much like the act in question in this case, except it contained in the act authorizing the tax and the subscription, while this act was passed after the tax had been voted and collected, and the stock subscribed. It should be stated as a fact which may have a material bearing on the question in this case, that the act of May 12, 1869, does not provide how the stock to be subscribed for by a county shall be held, how it shall be managed, or to what purpose it or its dividends shall be applied. The legislature, apparently by design, omitted to make any specific appropriation of the stock or its dividends to any purpose. The way is, there-

fore, left open to a further act declaring what shall be done with the stock, &c., and to what uses or purposes it shall be applied.

The constitutionality of the act of May 12, 1869, under which the tax was collected and the stock taken, is maintained upon the theory that the railroad in aid of which the money is to be appropriated is a work of public utility, to be constructed for the public good. The primary object is to aid in the construction of the railroad. The title to the act and the act itself clearly indicate this. The tax when collected does not go into the county treasury as such. It does not become the property of the county. It is collected for a specific purpose, and the county officers are appointed to collect and finally devote the money to the purpose for which it is raised. The commissioners may take stock in the railroad company in the name of the county, * * * *
53 or donate the money to the company "for the purpose of aiding in the construction of such railroad."

The tax could not be collected for the mere purpose of taking stock; but it might be for the purpose of aiding in the construction of the railroad, and as the mode of apportioning the money the county commissioners are authorized to take stock, in the name of the county, and pay the money over to the company. It does not thereby become the property of the county in the sense that it would if purchased with county funds, and the primary object was the purchase of the stock for its own use. We do not think the right of the county to the stock thus taken is of such a character as to prevent the State from providing that it shall be transferred and issued to those who paid the money with which it was bought. It is equitably theirs; their money bought and paid for it. It is true that, under the law, the stock is taken in the name of the county, but, as before stated, that is only the mode of appropriating the money to aid in the construction of the railroad.

It is not to fix the ultimate right to the stock. If the law had
54 provided that the stock should be taken in the name of the sheriff of the county, the intention that the person selected as the holder of the stock was simply a matter of convenience, would, perhaps, at first be little more apparent than now. Still a little reflection will show that there would not, in fact, be any difference. If the commissioners concluded to take stock, it would be necessary that it should be taken in the name of some person, but, in our opinion, subject to any future legal disposition by the legislature.

It has always been the language of this court, with reference to the constitutionality of acts of the legislature, that they must be sustained unless they are clearly and undoubtedly repugnant to the constitution. We have not found any such repugnancy between the act in question in this case and the Constitution of the United States or of this State, as, in our opinion, should render it invalid. We must, therefore, hold the judgment of the circuit court enjoining the treasurer of the county from issuing certificates as required by the act to be erroneous.

The judgment is reversed with costs, and the cause remanded, with instructions to dismiss the complaint.

55 THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY
vs.
MARTIN LUCAS, TREASURER, &C.

Buskirk, J., and Pettit, J., being unable to concur, in the opinion and

judgment pronounced by a majority of the court, dissent therefrom, and state the following reasons for their dissent:

The facts of the case and the questions of law arising on the record sufficiently appear, in the opinion of the majority of the court, and need not be restated. The cause was tried before Judge Vinton, who delivered a very able and exhaustive opinion in reference to the constitutionality of the law in question. We fully concur in the views expressed by the learned judge, and make his opinion a part of this dissenting opinion, and which is as follows:

"This is a complaint for an injunction. I am asked to enjoin the defendant, as the treasurer of said county, from issuing such certificates as are contemplated by an act entitled 'An act to require
56 railroad companies to issue stock, paid for by taxes, voted in aid of the construction of their railroads, to the tax-payers or their assignors, and to issue unclaimed stock for the benefit of the common-school fund,' &c., approved December 17th, 1872, on the sole ground that said *ground* is unconstitutional and void. The complaint, in my judgment, fully presents the point above indicated, and I am compelled, in the discharge of my official duty, to adjudge it. I am aware that even courts of the highest character for learning, integrity, and ability have ever approached questions involving the validity of legislative enactments impressed with a sense of deep responsibility. A judicial question of greater gravity or more serious import cannot arise under our system of government.

"I am not, I trust, insensible to the importance of the questions and the magnitude of the interest involved in this case.

"I have given the subject the best examination I could in the time allowed me. If, in the conclusion to which I have arrived, I have
57 erred, I am glad to know that the error can be speedily and effectually remedied by a higher court. I have done the best I could, and that, as I understand it, embraces my whole official duty.

"Since the only question before me is one of constitutional power, it is manifest that a discussion of the fitness or unfitness of the members of the board of commissioners for the position they hold is wholly out of place, nor can the justice or injustice, policy or impolicy of the act in question have anything to do with the solution of the question.

"The question under consideration arises as follows: In 1869 the legislature passed an act authorizing aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies. Under this act such steps were taken as resulted in a submission of the matter whether a railroad appropriation should or should not be made in aid of the Lafayette, Muncie and Bloomington Railroad Company to a vote of the people of this county,
58 which resulted in favor of such appropriation.

"Thereafter the board of commissioners levied the tax as provided in section 12 of said act.

"Section 14 of said act provides that 'said board of commissioners may, after the assessment herein provided for, or any part thereof, shall have been collected, take stock in said railroad company, from time to time, in the name of the proper county or township, as the case may be, and pay therefor when the same is taken out of the monies so collected as aforesaid, or they may donate such moneys to such company for the purpose of aiding in the construction of such road, and pay the same over, from time to time, as the work progresses, as hereinafter provided.'

"As the taxes thus levied were collected from time to time and during

the years 1871 and 1872 and 1873, the board of commissioners subscribed and paid for stock in the Lafayette, Bloomington and Muncie Railroad Company, a railroad corporation duly organized under the laws of this State. At the time such subscriptions and payments were made
59 said railroad company issued its stock-certificates to the board of commissioners for 6,610 shares of stock of the par value of fifty dollars per share.

"It is claimed by the plaintiff's counsel that this stock became and is the property of the county, and that her beneficial ownership cannot be taken away and given to private citizens for private purposes, as is attempted to be done by the act of December 17, 1872, as above referred to.

"It is admitted on all sides that the plaintiff is a corporation.

"Corporations are of various kinds, but the only division that need be referred to in this discussion, is that of public and private corporations.

"As to the latter kind, the law is well settled by a long line of decisions, commencing with the celebrated Dartmouth College case, that their rights, privileges, and franchises are protected from legislative interference by the clause of the Federal Constitution which forbids a State from passing any law 'impairing the obligation of contracts.'

60 "It is well settled that a strictly public corporation, whatever that may be under the authorities, is wholly subject to the legislative control, except as to certain limitations as to proprietary rights.

"In the case of Tenet vs. Taylor, (9 Cranch, p. 52,) Mr. Justice Story, in the only opinion delivered, uses this language: 'In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom, and at whose expense, it was originally purchased.'

"Again, in the Dartmouth College case, 4 Wheaton, at page 563, Mr. Justice Washington says: 'But the case of Tenet vs. Taylor (9 Cranch, p. 43) fully supports the distinction above stated between civil and private corporations, and is entirely in point. It was decided in that case that private corporations created by the legislature may loose *its* franchises by misuses or non-uses, and they may be resumed by the government under a judicial judgement of forfeiture. In respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify,
61 enlarge, or restrain them, securing, however, the property for the use of those for whom, and at whose expense, it was purchased.'

"In the same case, at pages 694 and 695, Judge Story says:

"'It may also be admitted that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations the legislative power is so transcendent that it may at its will take away the private property of the corporation or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporation? If a municipal corporation be capable of holding devises and legaci's to charitable uses, (as many municipal corporations are,) does the legislature, under our form of limited government, possess the power to seize upon those funds and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and d'visors? From the very nature of our govern-

62 ments the public faith is ple'ged the other way, and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation. This court have already had occasion in other cases to express their opinion on this subject, and there is not the slightest inclination to retract it.'

"The limitation of the legislative power, as expressed by Judge Story, has been generally received and quoted as the true rule on the subject. Thus Chancellor Kent, in the second volume of his Commentaries, at page 305, declares: 'In respect to public or municipal corporations which exists only for public purposes, as counties, cities, and towns, the legislature, under proper limitations, have a right to change, modify, enlarge, restrain, or destroy them, securing, however, the property for the use of those for whom *they were* purchased. A public corporation instituted for purposes connected with the administration of the government may be controlled by the legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. In those public corporations there is, in reality,
63 but one party, and the trustees or governors of the corporation are merely trustees for the public.'

"Judge Cooley, in his work on Constitutional Limitations, quotes the rule laid down by Judge Story with entire approbation. Under the head 'Legislative control of corporate property,' at page 235, he declares: 'Thelegislative power of the State controls and disposes of the property of the State. How far it can also control and dispose of the property of these agencies of government which it has created and endowed with corporate powers is a question which, happily, there has been very little occasion to discuss in the courts. Being a mere agency of government, it is evident that the municipality cannot itself have the complete and absolute control and power of disposition of its property which is possessed by individuals over their own. For it can hold and own property only for corporate purposes, and these purposes are liable at time to be so modified by legislation as to render the property no longer available. Moreover, the chartered rights may altogether be taken away; and in that case the legislature has deprived the corporation of its property by depriving it of its corporate
64 capacity to hold it, and in many ways, while the corporations holds and enjoys property, the legislature must possess power to interfere and control, at least incidentally; for the mere fact that the corporation possesses property cannot deprive the State of its complet' authority to mould and change the corporate organization and enlarge or diminish its powers which it possessed before. But whether the State can directly intervene and take away the corporate property, or convert it to other uses than those for which it was procured, or whether on repealing a charter of incorporation it can take to itself the corporate property and dispose of it at discretion, are different questions from any raised by the indirect or incidental inferences referred to.'

"This author then quotes the rule laid down by Judge Story, and by Judge Washington in Dartmouth College case, and then proceeds as follows:

"'The rule upon the subject seems to be this, when corporate powers are conferred, there is an implied compact between the State and
65 the corporators that the property which they have the capacity to acquire under their charters shall not be taken from them and appropriated to other uses. If the State grants property to the corporation, the grant is an executed contract, which cannot be revoked. The rights acquired, either by such grants or by any other legitimate mode

in which such a corporation can acquire property, are vested rights, and cannot be taken away. Nevertheless, when the corporate powers are repealed the corporate ownership ceases, and by modification of corporate powers the legislature may in other cases affect and divest the rights of individual corporators, so far as they can be said to have any rights in public property, and in other ways and by direct intervention the legislature may exercise control over the disposition and use of property, subject to the restriction that it must not be diverted to a use substantially different from that for which it was acquired.'

"Judge Dellon, in his work on Municipal Corporations, at page 8,
66 holds this language: 'The weight of opinion seem' to be in favor of the doctrine that there may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature, though not beyond legitimate legislative authority and control; but in the present state of decisions the subject cannot fairly be said to be settled.'

"I know of no American text-writer who asserts a contrary view, and I know of but one decision (Darlington vs. New York, 31 N. Y., p. 164) where the legislative control is claimed to be quite without limit.

"Before proceeding to the cases, so far as they exist, in which this rule has been applied, it will be well to examine our own decisions, to see whether they have recognized the rule laid down by Judge Story. If they have, notwithstanding its repudiation by so learned a jurist as Judge Denio, (in the case last referred to,) I am bound by it and its fair logical consequences.

"In the case of Armstrong et al. vs. The Board of Commissioners of Dearborn County, 4 (Blackford, 208,) a case growing out of the
67 relocation of the county-seat, the rule as laid down by Story and Kent is quoted with approval. The court says: 'Our counties are all incorporated. They are public corporations, created for public political purposes, and the whole interest in them belongs to the public. The legislature have, therefore, in the language of Kent, under proper limitations, the right to change, modify, enlarge, or restrain them, securing, however, the property for the uses of those for whom it was purchased.'

"In Edwards vs. Jaggers et al., (19 Indiana, 407,) a case involving the validity of a clause in our constitution of 1852, authorizing the sale of county seminaries, Worden, judge, speaking for the court, says:

"'The language of the Supreme Court of the United States in the case of Ternet vs. Taylor, (9 Cranch, 43,) is in point here. The court says: 'In respect to public corporations, which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom,
68 and at whose expense, it was originally purchased.' This emphasis is Judge Worden's.

"In the case just quoted from, the corporation before the court, namely, the Switzerland County Seminary, was held to be a private eleemosynary corporation, and that its charter and the rights accruing under it were protected by the Federal Constitution. The point then ruled does not directly affect the question before me, but the limitation upon legislative supremacy, as announced by Story, is recognized with emphasis.

"Numerous adjudged cases lay down this rule of limitation, but I shall not take the trouble to cite them, except as they may hereafter be referred to, to illustrate the application of the principle. In my judgment, the rule is abundantly established by authority, and is founded in reason an' sound policy.

"Is this rule to be applied in this case?

"It is contended by plaintiff's counsel that under our constitution and under the peculiar powers conferred upon county commissioners
69 by the act providing for the organization of county boards, approved June 17, 1852, they are, as to certain powers conferred, (including the power to acquire railroad stock,) private corporations.

"It is claimed that this act, and especially the fifth section thereof, greatly enlarges the powers of county corporations, and endows them with more vigorous corporate life than they had ever possessed in this State prior to its enactment.

"Section fifth reads: 'Such commission'rs shall be considered a body corporate and politic, by name and style of the board of commission'rs of the county of , and as such, and in such name, may prosecute and defend suits, and have all other duties, rights, and powers incident to corporations not inconsistent with the provisions of this act.'

"It is also contended that a distinction is to be drawn between such powers as are conferred upon the plaintiff for public purposes exclusively and such as are conferred for private advantage and emol-
70 uments; that the former powers belong to the plaintiff in its public, political, or municipal character, but as to the latter, though the public may derive a common benefit therefrom, the plaintiff is quod hoc to be regarded as a private corporation. This distinction is taken and maintained by numerous cases, though there are some that hold that no such distinction can or does exist.

"If this distinction may be relied on as the basis of a decision in any case where the powers of a public corporation are under review, it seems quite clear to me that it can be relied upon here. I say this upon the following considerations: The constitution of Indiana expressly forbids tha' State to become a stockholder in any corporation or association. Section 12 of article 11 read thus: 'The State shall not be a stockholder in any bank after the expiration of the present bank charter; nor shall the credit of the State ever be given or loaned in aid of any person, association, or corporation; nor shall the State hereafter become as stockholder in any corporation or association.'

71 "The constitution, in other parts of it, as construed by the supreme court, declares that counties may become stockholders in a corporations if the stock is paid for at the time of the subscription. According, then, to the fundamental law, a county may, but the State may not, become a stockholder in a railroad company. The section of the constitution authorizing counties tos take stock is not self-executing. I' requires the affirmative action of the legislature authorizing the board of commissioners to subscribe for stock. Such an enabling act is found in the railroad-aid law of 1869. It has been held to be constitutional to wield the tax-power of the State in aid of a railroad company, for the reasons therefor given at large by the supreme court.

"Now, the county levying the tax to create a fund with which to make a donation to or take stock in a railroad company is using a power given it as a public corporation; but in subscribing for stock in such company, to be held for its private advantage and emolument, it may be acting as a private corporation.

72 "At all events, it is difficult to see how a county holds such stock, in the strict sense spoken of in the books, as public property.

"In legal contemplation, the board of commissioners of a county is the county, (4 Ind., 315,) and, in my judgment, when such board acquires stock in a railroad company under the constitution and the act of 1869,

it takes it and holds it, not strictly as an instrument of governmental agency, but as the trustee of the inhabitants of the county; not as property held for State purposes, but as property held for the benefit of the people of the county.

"I do not mean to say that the board of commissioners took and held this stock, to all intents and purposes, as an individual holds his property, for under the authorities I do not think such a doctrine is maintainable. But I hold that stock thus acquired by a board is not acquired or held for public purposes, in the sense that the power of the legislature over it is omnipotent.

73 "But whatever may be said of the soundness of an argument or a decision based upon the double character of the plaintiff, the one governmental, legislative, or public, the other in a sense proprietary or private, I feel I am standing on absolutely sure ground when I rely upon the rule limiting legislative omnipotence, as laid down by those great and imperishable lights of the profession, Judge Story and Chancellor Kent.

"Does this rule, fairly applied, render the act in question clearly and palpably in conflict with the clause of our State constitution which declares that no law impairing the obligation of contracts shall ever be passed?

"I think it plain that the plaintiff acquired the stock in question by virtue of a contract with the railroad company. Here were two parties, the plaintiff on one side and the railroad company on the other, each competent to contract as to the subscription of stock. At all events, the plaintiff paid the money to the company, and the company, in consideration thereof, issued to the plaintiff the stock-certificates in ques-

74 tion, and as between them these acts created reciprocal rights and obligations. It is not questioned that the legal title to the stock-certificates for a large number of shares of stock in the Lafayette, Muncie and Bloomington Railroad Company was vested in the plaintiff, in trust for somebody, at the time the act of 1872 was passed. For whom did the board hold this stock? Who were the beneficiaries?

"The defendant's counsel claim that, as to this stock, the plaintiff was the trustee for the persons who paid the taxes with which the stock was purchased, and that, therefore, the statute does nothing more than compel the trustee to execute the trust in favor of the beneficiaries, and that in this view the statute is not only valid but highly just and commendable.

"No authority was cited in support of the assumpsion that the tax-payers above referred to were the only beneficiaries, and I imagine none can be found, or the persistent diligence of the counsel would have supplied it. The inhabitants are the beneficiaries. The corporation known as the Board of Commissioners of Tippecanoe County, in my judg-

75 ment, is the trustee, as to the property in question, and all other property which it has or can by law acquire, of the whole people of the county. Property is taxed to support the government, because the government secures and protects property. Property is taxed to build railroads, (so the theory runs,) because railroad' enhance the value of property, and are otherwise of public benefit. When a tax-payer pays a tax lawfully assessed for county purposes into the treasury, he ceases to have any specific and individual interest in it, and it becomes the property of the county, for the benefit of all the people of the county.

"What specific or enforceable interest, distinct from the general public, did the largest tax-payer to the railroad appropriation have in the money he paid after it was in the treasury, or to the stock-certificates

after they were purchased, prior to the act in question? Clearly and palpably, none whatever. If he has any legal right to the stock in question over and above that of the poorest man in our midst, he has it by virtue of the act of 1872, that is claimed to be void.

76 "But, as a matter of fact, are the persons designated in the act as entitled to the stock the only ones who contributed to its purchase? Directly they undoubtedly are; indirectly, certainly are not.

"The $373,000 voted to aid in the construction of the Lafayette, Muncie and Bloomington Railroad, though nominally laid on the property of the county, was, in fact, a burden laid on the productive industry, on the labor, of the county. Tax-burdens like this, though laid in the first instance on the property-holders, distribute themselves on the entire labor of the community, by a law as inevitable and uncontrol'able as that which constrains water to find a common level. It is as impossible to ascertain with any degree of certainty who in reality shared the burdens of this tax as it is to ascertain who bear the burden of the wholesale-license tax to the United States Government, nominally paid by O. W. Pierce and Co. This firm paid the tax to the Government, but they charged the same, in whole or in part, upon the goods they sold,

77 and these goods went charged with the same through all intermediate persons, till they reached the consumers, who finally shared, in whole or in part, in the original burden.

"The assumption of law, that the persons described in the act are the only beneficiaries, and the assumption of fact that they alone shared in the burden of the tax, are, in my judgment, wholly *in*founded. The board of commissioners is the trustee of the inhabitants of the county, and the inhabitants of the county, not some of them, but all of them, are the beneficiaries.

"It was admitted, in argument by the defendant's counsel, that an act which should attempt to take this stock from the county and give it to an individual for his own use would be clearly beyond the legislative power. Yet, what is sought to be done by the act in question, when stripped of the specious and *in*founded assumpsion that the persons described in the act are the sole benefic'a'ies, is just what is admitted could not be done.

78 "Could the legislature, under the rule limiting its power, as laid down by Judge Story, and approved with emphasis by Judge Worden, of our own supreme court, constitutionally divest the county of its legal and beneficial ownership in this stock and give it to the individuals contemplated to hold as their private property?

"If I am correct in the positions already laid down, the conclusion is inevitable that the act in question, when viewed in the light of this rule, is unconstitutional and void. That the legislature might change the trustee, or do many other things which need not be specified, so long as the uses to which the stock is devoted are left intact, is admitted. But this act, divesting the beneficial ownership of the plaintiff and investing it in individuals, converting the public county use to individual private use, is, to my mind, clearly and plainly beyond the legislative power.

"Many authorities were referred to by counsel on both sides during the able and protracted argument, as bearing more or less di-

79 rectly upon the question in hand. I have given them all such examination as I could, but I have neither the time or the ability to review them, nor would such review subserve any good purpose.

"I will, however, briefly allude to the case of the Town of Milwaukee vs. The City Milwaukee, (12 Wisconsin, 93,) relied upon as most strongly

in point by the plaintiff's counsel, and the case of Darlington vs. The City of New York, (31 New York, p. 164,) equally relied upon by the defendant's counsel.

"As to the opinion of Chief-Justice Denio, in the last case, it has already been said that it repudiates the rule of limitation so generally recognized by text-writers and adjudged cases, including the cases in our own court. He arrives at the conclusion that the legislative power over the property of public corporations is entirely without limitation. In my opinion, his conclusion is opposed to the great weight of the authorities, and is not, if I may be allowed to say so, sustained by the force of sound reasoning.

80 "The former case was decided by Chief-Justice Dixon, and the question, as he put it, and which he discussed, must be admitted to be almost exactly in point in this case. The question that he examined was, whether the legislature could, constitutionally, take property that belonged to the town (township) of Milwaukee by purchase and give it to the city of Milwaukee. He denies emphatically the power of the legislature to do this, and goes into a very elaborate and candid discussion of the whole question. But it is claimed that all Judge Dixon said on this subject was obiter, and ought not to have the force of authority. But the question was assumed to be on the case, and it must be admitted that its solution was decisive of it. The same criticism, urged against this case as authority, may be made with equal, if not greater, force to the decision of Judge Denio, in the case referred to. But whether what was said by Judge Dixon was said in the decision of a question necessarily before him or not, his argument is, in my judgment, sound, and his conclusion sustained by reason and the great weight of authority.

81 "From the examination I have been able to give the subject, (necessarily limited,) aided by the very able discussion had at the bar, I am of the opinion that the act in question, so far as it effects the plaintiff in the matter complained of, is clearly and palpably unconstitutional and void, and that the defendant ought to be enjoined according to the prayer of the complaint."

The primary and controlling question in the case is whether the stock subscribed by the board of commissioners in the name of the county of Tippecanoe became the property of the county. The opinion of the majority of the court is based upon the theory that it did not; and it is manifest that if such theory is untrue, *that* the conclusion based thereon is unsound and cannot be supported. It is said in the opinion of the majority that "the tax, when collected, does not go into the county treasury; it does not become the property of the country."

We controvert both propositions. The tax, when collected, does
82 go into the county treasury, and is retained by the treasurer until he is required by the warrant of the auditor to pay it out for the purpose for which it was levied and collected. Such warrant can only issue upon the order of the commissioners. It is provided by the 12th section of the act authorizing aid to railroads that such "tax shall be collected in all respects as other taxes are collected for State and county purposes." Taxes collected for State and county purposes are paid into the county treasury, and are retained by the treasurer until paid out upon the warrant of the auditor. The difference is this: When taxes are collected for county purposes and paid into the county treasury, the money becomes a part of the general fund of the county, and may be expended for any legitimate county purpose; but the money collected under the railroad act is collected for a specific purpose, and is held in trust by

the county until the commissioners have either subscribed for the stock or donated the money to aid in the construction of the railroad
83 indicated. It is provided in the 18th section that upon a failure of the railroad company to commence work within one year, or to complete the road within three years, the money so collected shall go into the general fund of the county or township, as the case may be, and be used accordingly. The special tax is levied upon the taxable property and polls of the county, and is collected in all respects as taxes for State and county purposes, and is held by the county to be applied to the specified purpose, and if not so applied the money goes into the general fund of the county. If the money does not belong to the county, how can it be converted into the general fund of the county if not used for the purpose for which it was collected? If the commissioners shall elect to donate the money to the railroad, then the money and all rights thereto pass from the county and become vested in the railroad. But if the commissioners elect to subscribe for stock, then the subscription is to be made in the name of the county, and the railroad company is required to issue to and in the name of the county certificates of stock.

84 Does not the county become a stockholder, and is it not entitled to vote at any meeting of the stockholders? The stock in railroad corporations is transferable upon the books of the company. Will any one doubt that the county of Tippecanoe might have sold and transferred the stock subscribed in her name, and that she could have vested a good title thereto in the purchaser? We presume no one can be found to question her power and right so to do. Has not the county been exercising her right as a stockholder in voting for the election of directors of the railroad company? Who ever called in question her legal right so to do? No one. But this further proposition is stated in the opinion of the majority of the court: "It does not thereby become the property of the county in the sense that it would if purchased with county funds, and the primary object was the purchase of the stock for its own use."

We are unable to appreciate the distinction which is attempted to be drawn between the payment for stock out of the general fund of
85 the county and the money collected upon the special tax. The money in each case is collected from the taxable property and polls of the county, and is collected in all respects the same. The money, when collected for county purposes generally, may be expended for any and all county purposes. The money collected for a special purpose can only be expended for that purpose, until the railroad has forfeited its right thereto, when it becomes a part of the general fund. The only difference between the two funds is, while they are held by the county, when either is paid out, it is paid as the funds of the county and for the benefit of the county. It is conceded in the above quotation that the county might have subscribed for stock and paid for it out of the general funds of the county, if a sufficiency had been in the treasury, and that, in such case, the stock would have belonged to the county. We cannot see what difference it can make in the ownership of the stock whether it is paid for out of the general fund, which has been raised
86 by taxation, or out of the special fund raised by taxation. In either case the money belongs to the county, and the stock purchased therewith should belong to the county.

The constitutionality of the act of May 12th, 1869, was sustained upon the ground that the 6th section of article ten of the constitution authorized a county to subscribe for stock in an incorporated company, on the condition that it was paid for at the time the subscription was made;

and this express grant of power carried with it, by necessary implication, the power to adopt such means as may be adequate to accomplish the end proposed. It is a settled rule of construing a constitution that a court should look to the history of the times and examine the state of things existing when the constitution was framed and adopted. When the section of the constitution in question was framed and adopted, which empowers counties to subscribe for stock in an incorporated company, there was in existence, and had been for more than ten years, a statute which reads as follows:

87 "It shall be lawful for any county within this State to take stock in such association, (which association was organized to continue the construction of all or any part of the public works by private companies;) and for this purpose the several boards doing county business are hereby empowered to subscribe therefor, and to levy a tax as for county purposes, not exceeding one dollar on every hundred dollars of assessed property, to be applied for such object; and the county shall hold such stock as individual stock is held in such association."

Is it not reasonable to suppose that the 6th section of article ten was framed and adopted in view of and in reference to the existing law and long settled practice of the State, and that it was intended that where a county should subscribe for stock in any incorporated company, *that* such county should hold such stock as individnal stock was held in such company?

88 It is unreasonable to suppose that the framers of the constitution intended to provide that the county might use the money which had been raised by taxation, and by right belonged to all the inhabitants of the county, in paying for stock which had been subscribed for, the title to which was to be vested in some other person. We think the true meaning of the constitution is that where a county should subscribe for stock the subscription should be made in the name of the county, and that the county should hold it as corporate property, and in trust for all the inhabitants of the county; that the county should be a stockholder, and have a voice and vote in the management of the incorporated company; and that the commissioners of the county might sell and assign such stock, and that the proceeds of the sale should go into and constitute a part of the general fund of the county. The act of the 28th of January, 1842, provides that a county might take stock in such an association, &c. The act of 14 of Feby., 1848, relating

89 to the Ohio & Mississippi Railroad, provides that "it shall be lawful for the county commissioners of any county in the State of Indiana through which said railroad passes, for and on behalf of such county, to take stock," &c. The Lafayette, &c., R. R. Co. vs. Geiger, 34 Ind., 206. The 6th section of article ten provides that a county may subscribe for stock, &c.

The act of May 12, 1869, provides that the commissioners shall subscribe for stock in the name of the county. Is it not plain and obvious that the constitutional convention and legislature intended that when money which had been raised by taxation was used in paying for stock which had been subscribed for in an incorporated company should be taken in the name of the county, and held and disposed of as other corporate property? We deny the power of the legislature to require or authorize a county to pay for stock with money which has been procured by taxation, and appropriate the stock to a private use. If the

90 legislature had possessed the power to and had provided that the stock should be taken in the name of the sheriff of the county, the stock would still have belonged to the county, though held in trust

by the sheriff, and could not have been appropriated to any private use. In such case such sheriff would hold such stock charged with a trust so sacred that even the legislature could not destroy it and convert it to private uses.

The opinion of the majority of the court seems to have been greatly influenced by the alleged fact that the act of May 12, 1869, does not provide how the stock *is* to be subscribed for by the county shall be held, how it shall be managed, or to what purpose it or its dividends shall be applied. The act of May 12, 1869, provides that the stock must be taken in the name of the county; and as it was paid for with the funds of the county, it must necessarily be held for the use of the county. It was wholly unnecessary that the said act should provide how it should
91 be managed, or to what purpose it or its dividends should be applied, as ample provision had already been made for such management and use. Section 10 of article 6 of the constitution provides that the general assembly may confer upon the boards doing county business in the several counties powers of a local administrative character.

An act approved June 17, 1852, provides that there shall be organized in each county in this State a board of commissioners for transacting county business, to consist, &c. It is provided by the 12th section of said act that "Such commissioners, in their respective counties, shall have power at their meetings: 1. To make orders respecting the property of the county, in conformity to law," &c. By the above act the board of commissioners of Tippecanoe County was vested with full and ample power to manage and control the stock subscribed in the name of the county, and to appropriate to legitimate county purposes the proceeds or dividends arising therefrom. It is a settled rule of con-
92 struction that the legislature is presumed to have in view, in the passage of a law, all existing laws relating to the same subject.

Having arrived at the conclusion that the stock subscribed in the name of the county of Tippecanoe became the property of the county, and that the right and title thereto was vested in the county, we proceed to inquire whether the legislature possesses a power to divest a vested right, or, in other words, to take from the county of Tippecanoe the property which belongs to her, and give the same to private citizens for private purposes, thus defeating the public purpose to which it had been dedicated.

Before we proceed to an examination of the authorities bearing upon the question under examination, we desire to express our appreciation of the fairness of the majority of the court in citing and quoting from authorities bearing upon both sides of the question in dispute. This action of the court will greatly relieve us of labor; but the proper illus-
93 tration of our views render it necessary for us to make a brief reference to the authorities cited in the opinion of the court, and this we will do in the order in which the references are made.

Judge Cooley, one of the most eminent and distinguished writers upon constitutional law, deduces from all the authorities the rule that the legislature may exercise control of the disposition and use of property belonging to a county, subject to the restriction that it must not be diverted to a use substantially different from that for which it was acquired; that is to say, as we understand it, that if the stock in question was acquired with county funds, for county purposes, *that* it cannot be directed to private uses.

The case of Darlington vs. The City of New York, 31 N. Y., 164, goes further than any American case in asserting the absolute and unre-

strained control of the legislature over property belonging to municipal corporations; but we are opinion it does not go far enough to sustain the constitutionality of the law in question.

94 The question was in that case whether the legislature possessed the power to make the property of the city liable to the payment of a judgment recovered against the city for damages sustained by a riot, and it was held that such power existed. The question was not whether the legislature could take the property of the city and give it to private persons, but whether the property of the city was liable to be sold upon execution to satisfy a judgment against the city. The court held that the property of the city was subject to sale upon execution to satisfy such a judgment, in the same manner and to the same extent as upon any other judgment. It is plainly inferrable, from the reasoning of the court, that an act would have been held unconstitutional which directed the appropriation of public property to private uses. The learned judge says: "Let us suppose the city to be the owner of a parcel of land not adopted to any municipal use, but valuable only for sale to private persons for building purposes, or the like. No one, I think, can doubt but what it would be competent for the legislature to

95 direct it to be sold, and the proceeds to be devoted to municipal or other public purpose within the city, as a court-house, a hospital, or the like."

We do not doubt the power of the legislature to so far control the action and discretion of a municipal corporation as to divest public property from one public use to another public use within the limits of such corporation. We do not doubt that the legislature might have directed the sale of the county stock in question, and appropriated the proceeds to the erection of a court-house, jail, or hospital, or the purchase of a poor-farm within the county. Such action on the part of the legislature would not have divested the title of the county to the stock, but would have changed the manner of its use. The proceeds of the sale would have remained the property of the county, and would have been appropriated to legitimate municipal and public purposes within the limits of the corporation; and additional extract from the opinion of Judge Denio will conclusively show that the court did not in-

96 tend to hold that property belonging to a municipal corporation could be appropriated to a private use. The learned judge says: "In one sense it may be conceded that it is taken for a public use; for when the State undertakes to indemnify the sufferers from riots, the execution of that duty is a public concern, and the expenditure is on public account. It is a public use in the same sense that the expenditure of money for the erection of court-houses and jails, constructions of roads and bridges, and the support of the poor. It is taken for an object which the legislature has determined to be of public importance, and for the interest of the State." In our opinion the above case does not support the opinion of the majority of the court, but sustains the view taken by us.

The case of the State of Maryland vs. The Baltimore and Ohio Railroad Company, supra, has but little application to the present case, for the reason that it was held that the payment of the million dol-

97 lars was not a matter of contract, but was a penalty imposed by the State, and that, as the counties named had no vested right in the penalty named, it might be released by the State. There can be no doubt as to the power of the State to release a penalty. The power was not called in question in the above case, but it was conceded that if it was a penalty and not a vested right, *that* the State might release it.

In the case of East Hartford vs. The East Hartford Bridge Company, supra, turned upon whether the ferry was held by contract or license, and it was held that there was one element of contract or vested right, The learned judge was careful to distinguish the case from one where. private property was involved. He says: "There is no private interest or property affected by this cause, but only public corporations and public privileges." It may be otherwise in case of pri vate bodies or individuals, or of private property, granted or acquired· The legislature might not be justified to make, transfer, or abolish them, on account of the private character of the party or the subject."

The case of the County of Richland vs. The County of Lawrence,
98 supra, is already distinguished from the present one. In that case the money was donated by the State to Lawrence County, to be expended in the construction of bridges and the repair of roads. Subsequently a part of Lawrence County was detached, and a new county formed of that and a portion taken from Clay County, and the legislature directed that a portion of the money which had been paid to Lawrence County should be paid to Richland County, and expended therein in the improvement of roads and the construction of bridges, and the like. The effect of the act was to take from one county money which had been donated by the State, and direct the expenditure of the same for public purposes in another county, which had been in part formed out of the territory which had belonged to Lawrence County. This was not diverting public property to private use. The decision of the court was based upon the fact that the money had not been expended. The court say: "Before its expenditure, we cannot doubt that the legislature had entire control over the fund, either to resume it altogether or to change the purpose*d* for which it was originally des-
99 ignated to be expended." The case of Dennis vs. Maynard, supra, involved in substance the same question as in the preceeding case, and was mainly decided on that case.

The case of the State ex rel. vs. The County Court, 34 Wis., 546, is very much in point in the present case, and very strongly supports the views expressed by us. The court say: "The funds of the county are not strictly private property. They certainly do not belong to th e citizens who may have contributed to them. They are rather public property, the property of the State, acquired from the people and property in the county, and to be used and expended for the use and benefit of the same people and property." The validity of the law was sustained, because the money, which belonged to the county, was directed to be expended for a public purpose within the county. There was no attempt on the part of the legislature to divert public funds to private use, as is done in the present case. The law, as we understand it to be, is s a ed with great clearness, accuracy, and force by the learned and v ry
100 eminent jurist who delivered the opinion of the court, when he says: "Whilst the legislature cannot take away from a c ı nty its property, it has full power to direct the mode in which the pr*o*perty shall be used for the benefit of the county."

The only question decided in Guinn vs. Weissenburg School District, supra, having any application to the present case, is that the legislature cannot impair the obligation of a contract, and to that extent is opposed to the opinion of the majority of the court.

The case of The Town of Milwaukee vs. The City of Milwaukee, 12 Wis., 93, deserves a more extended review than is given in the opinion of the majority of the court. The following extract from the opinion of the court has a direct and important bearing upon the question involved

in this case. The court say: "The difficulty about the question is to distinguish between the corporation as a civil institution or delegation of merely political power, and as an ideal being, endowed with the
101 capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified, or destroyed by the legislature; but in the capacity as owner of property designated for its own or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference or control, without the consent of the *corporations*, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body. It might sell its property, or the same *right* be lost or destroyed, and yet its powers of government would remain. In its character of a political power or local subdivision of government it is a public corporation; but in her character of owner of property it is a private corporation, possessing the same rights, duties, and privileges as any other.
102 This distinction is clearly laid down and established in the case of Bailey and Others vs. The Mayor, &c., of the City of New York, 3 Hill, 531, and authorities there cited. The inviolability by legislative interposition of the rights and franchises of a private corporation, in case where there is not, by its charter, or the constitution of the State by which it was granted, a reservation of power to repeal or modify, is demonstrated and established in the case of Dartmouth College vs. Woodward, 4 Wheat., 518, by a force of reasoning and power of argument to the strength and clearness of which nothing can possibly be added. It was there held that the charter of such a corporation was a contract, within the meaning of the first subdivision of section 10, article 4, of the Constitution of the United States, which declares that no State shall pass a law impairing the obligation of contracts. The same provision occurs in the 12th section of the 1st article of our State constitution. The reasoning of that case extends as well to the
103 power of the legislature to interfere with the franchises as the rights of property of such corporations; but it is only with respect to the latter that it can be considered applicable to the question we are now considering, and there it is clearly so. Every argument used goes with equal force to prove that the legislature has no power to divest a municipal corporation of its property previously acquired by purchase or otherwise. This want of power depends not upon the character of the corporation, but upon the nature of the right. The right to repeal or modify is not a right to interfere with vested rights of property. The power may exist without the latter. If the legislature possessed both, the exercise of one would not depend on the other. How the total repeal of the charter of a municipal corporation, without provision as to the disposition of its property, (a circumstance not likely to occur,) would affect such property or the rights of its inhabitants, we are not called upon here to decide. It is sufficient that the corporation of the town of Milwaukee still continues to exist, and so long as
104 it does so it is impossible to make a distinction between its rights of property and those of a corporation merely private. Both are, and ought in the nature of things to be, equally sacred. In Terrett vs. Taylor, 9 Cranch, 43, the right of a State government to dispossess a private corporation of its property was directly passed upon and decided."

The same court, in the subsequent case of The State of Wisconsin ex

rel. etc., vs. F. X. Hoben, treasurer, &c., 22 Wis., 660, uses this language: "It is well settled as to all matters pertaining to vested rights of property, whether real or personal, and to the obligation of contracts, that municipal corporations are as much within the protection of the Federal Constitution as private individuals are. The legislature cannot divest a municipal corporation of its property without the consent of its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporation."

In the case of Baily vs. The Mayor, &c., 3 Hill, 531,
105 was an *an* action against the corporation of the city of New York for injuries occasioned by the negligent and unskilful construction of a dam in the Croton River, it appearing that the dam was a part of the work undertaken pursuant to the act for supplying the city with pure and wholesome water, and that it was built by persons employed for the purpose under a contract with the water commissioners, the liability of the city depended upon whether the water commissioners were the agents of the State or the corporation of the city. Mr. Chief-Justice Nelson, in delivering the opinion of the court, draws with great accuracy and clearness the line of distinction which exists between the powers of a legislature over a municipal corporation in its character as a municipal or a public body and its character as a property owner. He says:

"The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special
106 private franchise, made as well for the private emolument and advantage of the city as for the public good. The State, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment, under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city, as much as the houses and lands belonging to it, situate within its corporate limits. The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body, such as are granted exclusively for public purposes to counties, cities, towns, and vil'ages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in
107 the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had not so much to the nature and character of the various powers conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for the purpose of private advantage and emolument, through the public may derive a common benefit therefrom, the corporation, quo'd hoc, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred. (Dartmouth College vs. Woodward, 4 Wheat., 668, 672; Philips vs. Berry, 1 Ld. Raym., 8; 2 T. R., 352, S. C.; Allen vs. McKim, 1 Sumner, 297; The People vs. Morris, 13 Wend., 331, 338; 2 Kent's Com., 275, 4th ed.; U. S. Bank

vs. Planters' Bank, 9 Wheaton, 907; Clark vs. Corp. of Washington, 12 id., 40; Moodalay vs. East India Co., 1 Brown's Ch. R., 469.)

108 "Suppose the legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual way in which powers are conferred upon private companies; could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers, in the eye of the law, would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company, and be subject to the responsibilities attaching to that class of institutions. The distinction is well stated by the master of the rolls in Moodaly vs. The East India Co., (1 Brown Ch. R., 469,) in answer to an objection made by counsel. There the plaintiff had taken a lease from the company, granting him the permission to supply the inhabitants of Madras with tobacco for ten years. Before the expiration of that period the company dispossessd him and granted privilege to another.

109 The plaintiff, preparatory to bringing an action against the company, filed a bill of discovery. One of the objections taken by the defendants was that the removal of the plaintiff was an incident to their character as a sovereign power, the exercise of which could not be questioned in a bill or suit at law. The master of the rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. 'They have rights,' he observed, 'as a sovereign power; they have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable.' It is upon the like distinctions that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. As such they are bound to repair highways, bridges, and churches; are liable to poor rates, and, in a word, to the

110 discharge of any other duty or obligation to which an individual owner would be subject. (2 Inst., 703; Thursfield vs. Jones, Sir T. Jones, 1873; Rex vs. Gardner, Camp., 79; Mayor of Lynn vs. Turner, id., 87; Henly vs. Mayor of Lynn, 5 Bing. R., 91; N. C., 222; S. C. in the House of Lords.)"

In addition to the reference made in the majority of the court to the case of City of Louisville vs. The Pres. & Trus., &c., supra, we make the following extract from the opinion of the court:

"If, as reason and observation prove, and as the authorities referred to assume, a municipal corporation may acquire property which does not thereby belong to the State, and may appropriate it to uses which the State cannot defeat or control, it is not, in such acts of acquisition and appropriation, the mere instrument or agent of the government representing and acting for it; and these acts, though done under the authority of the law, cannot be regarded as acts of the State or its government, or as

111 a part of its administration; nor can they themselves impart that character to the object of the appropriation, nor subject it to a legislative power which did not attach either to the object of the appropriation or to the property itself before it was appropriated; but such property, so far as the State is concerned, has all the attributes and is entitled to all the protection of private property."

Let us apply the principle above enunciate' to the present case

Although the tax which was levied to aid in the construction of the railroad, was levied and collected in pursuance of law, it was collected from the property and polls of the county for the purpose of aiding in the construction of a work of public importance; yet when such aid had been rendered, the public purpose of the law was accomplished, and the stock which had thus been paid for became the property of the county, and, "so far as the State is concerned, has all the attributes and is entitled to all the protection of private property."

112 In the case of The Louisvillee, &c., R. R. Co. vs. The county court of Davidson County, supra, no question of contract or divesting vested rights arose or were decided by the court, for the reason that the original act provided that the stock should be issued to the tax-payers in proportion to the tax paid by them. If the subscription had been made in the name of the county and the stock issued to the county, the question would have arisen, as it does in this case, whether the legislature could have taken the property of the county and given it to private citizens of the county.

Upon that point the language of the supreme court of Vermont, in Atkins vs. The Town of Randolph, 31 Vt., 266, is very appropriate. The court say:

"Since som' early judicial notions of Chief-Justice Gibson, no judge or court has estimated that the property of one person could be taken without his consent and transferred to another, either with or without compensation, merely by force of legislative enactment. In what-

113 ever form the question may arise, the uniform judgments of the courts of this country has settled that such would be unconstitutional and void legislati'n."

In the same opinion the following language is used:

"So far as a municipal corporation is endowed by law with the power of contracting, and as such is made 'able of acquiring, holding, and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity, thus being invested with legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, to be ascertained and enforced by suit in the ordinary judicial forms, upon the same principles and by the same means as in case of a private corporation, such municipal corporation must stand on the same ground of exemption from legislative control and interference as a private corporation."

In Tonehard vs. Tonehard, 5 Cald., 306, it is said:

"On the other hand, a corporation, both by the civil and the

114 common law, is a person, an artificial person, and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affects its ownership of property, in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as natural persons."

We have arrived at a very different conclusion in respect to the weight and effect of the authorities bearing upon the constitutionality of the act in question, to what the majority of the court have. We think they satisfactorily and conclusively show that the act in question is unconstitutional and void.

A doubt is suggested in the opinion of the majority of the court as to whether the same principle of law applies to counties that do to cities. There is a difference as to the liabilities of counties and cities for

115 injuries occasion' by the wrongful acts of the officers of such municipal corporations. The liability of cities is much greater than that of counties. But we have found no authorities which hold that the legislature has any greater power or control over the property of a county than it has over that of a city, and we know of no reason why any difference should exist.

Finally, it is said, in the opinion of the majoritty of the court, that the act, the validity of which is involved, is eminently just and equitable, and the question is asked, what objection can be urged against it?

In answer to the question propounded, we urge the following objections:

First. In our opinion, the act is not only against natural right, but the spirit of the constitution, because it inval'ates the obligation of contract and attempts to divest a vested right.

Second. It is an act of bad faith to such counties as have subscribed for stock in railroads in the name and for the use of the county.

116 Third. It is unfair to the voters of such counties as have imposed a tax upon their property and polls under the act of May 12, 1869, to aid in the construction of some railroad, and especially is such the case in reference to the county of Tippecanoe, for in that county the question, and the only one, submitted to the voters was whether they were in favor of subscribing for stock in the name of the county. The result of the vote might have been very different if the proposition had been that the voters should become stockholders in the railroad company in proportion to the amount of taxes paid, and that such stockholders should be individually liable for all labor done in the construction of said road that should remain unpaid after the assets of the corporation had been exhausted.

Fourth. The act in question is unfair and unjust to the creditors of the railroad company, because it provides that the persons who shall become stockholders, by virtue thereof, should hold the same relieved of any individual liability.

117 Fifth. The act in question will operate injuriously upon the railroad and upon the citizens of the county. When the county was the owner of the stock, her voice and vote exercised a controlling and health' influence upon the management of the railroad, and inspired confidence in the community as to the completion of the enterprise and that its affairs would be safely and economically conducted. Laborers could be procured, because they could look to the individual liability of the largest stockholders for the payment of their wages. If the law is held valid and the stock is distributed among the tax-payers of the county, the amount held by most of the tax-payers will be too small to induce them to look after the management of the road, and especially as they are relieved of individual liability for the debts of the railroad company. The result will be that in a short time the stock will be concentrated in the hands of a few men, who will pay but little therefor, and will exercise a controlling influence in the management of the railroad, relieved of all individual liability as such stockholders; or if the stock is retained by the tax-payers, they will fail to vote, or if they do

118 vote, they will be so divided in opinion that their influence will be neutralized if not destroyed. In either event, the effect cannot fail to be disastrous to the railroad and the prosperity of the county, so far as it depends upon the completion and successful management of such railroad.

Sixth. The act in question is a fraud and imposition upon the other stockholders. It is provided by section 38 of the railroad act of May 11th,

1852, that "the stockholders shall be individually liable for all labor done in the construction of said railroad that shall remain unpaid after the assets of the corporation shall have been exhausted." It is provided by the third section of the act of December 17, 1872: "That the stock so issued under the provisions of this act being involuntary in its character, no personal liability shall attach to the original holder thereof for any debt contracted by the railroad company." The effect will be, that while the other stockholders will be individually liable for the debts of the railroad, they may have their voice stifled and their influence in the management of the road destroyed by the voice and influence of
119 stockholders who have no individual liability for the debts of the company. This will be unfair, unjust, unequitable, and disastrous to the railroad. The stockholders should all stand upon the same footing and restrained and influenced by the same considerations and motives.

Seventh. In our opinion, all such legislation will have a demoralizing and deleterious influence upon the people of the State, because it teaches a disregard for the sacredness and binding force of contracts and obligations, and makes the purposes and interests of a few persons paramount to the best interest of the community.

Believing, as we do, that under the Constitution of the United States, and of this State, the legislature is prohibited from divesting or attempting to divest, without its consent, a municipal corporation of its rights of property lawfully acquired, we have felt it to be our duty to so declare, and to state our reasons for such convictions at considerable length.

In our opinion, the judgment of the court below should be in all things confirmed.

120 NOTE.—Since the decision of this case, the case of Spaulding against The Town of Andover has been decided by the supreme court of New Hampshire, to which we refer, as strongly sutaining the views expressed in the opinion of the minority of the court.

It is therefore considered by the court that the judgment of the court below in the above-entitled cause be in all things reversed, at the cost of the appellee, and the cause remanded with instructions to dismiss the complaint, all of which is ordered to be certified to said court.

And it is further considered by the court that the appellant recover of the appellee the sum of dollars and cents for costs and charges in this behalf expended.

121 And afterwards, to wit, on the 7th day of May, A. D. 1874, came the appellee, by her attorneys, and filed her motion and petition, and thereupon moved the court to grant a rehearing in said cause, and said motion and petition are in the words and figures following, to wit:

Supreme court of Indiana, November term, 1873.

MARTIN LUCAS *vs.* THE BOARD OF COMMISSIONERS OF TIPPECANOE County.	Appeal from the civil circuit court of Tippecanoe County.

Petition for a rehearing.

The appellees petition the court to grant a rehearing in the above-entitled cause, because the judgment of the civil circuit court from

which the appeal was taken should have been affirmed, and not reversed, by this court; and because the court seems to have
122 overlooked the act of 1842, de'laring how stock in railroad companies shall be held, which changed the legal character of such holding, if the court is not mistaken as to what that character would be without any statute declaring it.

WILSON & ADAMS,
Z. & S. P. BAIRD,
ROBT. JONES,
Attorn'ys for Appellee.

Brief by appellee.

The appellee would respectfully present some considerations which it is hoped may influence the court to grant its petition:

1. The questions presented by this record are of commanding and continuing importance. Vast sums of money have been invested in railroad-stocks under the act of 1869. What s the character of the property in such stocks, and who are the owners thereof, are questions of great importance, and to this kind of property a character and species of ownership should not be lightly affixed by this court which is an
123 anomaly and makes it something the like of which had never before been recognized.

There is a hint by the court that there may be a distinction between the property of a county and that of a city, as to the extent of the legislative power over it; but no hint as to what the distinction may be. And it is difficult to conceive on what the distinction would rest. Both exercise parts of the governmental power within ascertained territorial limits, and exist solely for the public, or rather the part of it within their respective jurisdictional limits, and both may become the owners of property, real or personal, so far as authorized by the State, and equally hold such property as trustees for the inhabitants within their respective limits.

Where is the distinction hinted at as controlling the action of the court? If it is to be recognized and acted upon, can it not be pointed out in some mode defined or marked, so that a common intellect may appreciate its existence? At least, is it not proper that an attempt should be made to render it apparent that the assumed distinction is an appreciable one?

124 2. We suppose the court does not intend to assert the broad proposition as to the property of a county (its jail, court-house, poor-farm, &c., &c.,) that the legislature may transfer any such property to an individual, or to a railroad, or other private corporation, or may take it for the use of the State, or sell it and convert the proceeds to an individual. We suppose this, because the court say the stock in controversy was not held as other property is held by the county. If not, what is the difference? For there ought to be some difference, if a distinction is made. Suppose the act of 1872 had not been passed, where would have been the distinction between this stock and other property of the county? Could it not have been sold and transferred by the county? Could not any dividends or proceeds of sales have been appropriated to any county purpose? Would any other use except that for the inhabitants of the county have attached to the stock, its accretions, or the proceeds of its sale? Would any individual have an interest, legal or equitable, in it, except that of each inhabitant
125 of the county in common with all other inhabitants? If without

the act of 1872 the county would have held this stock for any use, except for the inhabitants of the county, what was that use? Cannot it be stated? Was it for the use of the State? Could the State have taken it? Was it for the use of those who paid the railroad taxes? What were their rights? How could their rights be asserted? What claim to this stock, dividends upon it, proceeds of sale, or other right, either against the county or the railroad company, did they have, either individually or collectively, which was not shared equally by the inhabitants of the county who paid no part of this tax?

Can such right be stated? Who can put it on paper? What court would have recognized such claim?

If before the act of 1872 no such rights existed, then up to that time the county must have been the owner of this stock and held it for the use of all the inhabitants of the county, that is, for the public represented by the county.

It must follow that the act of 1872 is unconstitutional, unless the State is held to be the beneficiary of all county property, and to have the right to take it for its own use or to bestow it
126 upon individuals as a gift, at the pleasure of the legislature; and yet the court, impliedly at least, admits there is no such right in the State.

No such right ever has been asserted by any court or any jurist of acknowledged ability. The nearest approach to it ever made was by Denio, C. J., in the case cited by the court, but he was speaking only as to the power of the legislature to enact that property of a city, held for specified city purposes, should be liable for judgments against the city for torts. He was discussing a debatable question. To guard against extending his reason too far, he says, 31 N. Y., p. 205: "It is unnecessary to say whether the legislative jurisdiction would extend to donating the city property to other public use than such as concerns the city or its inhabitants." There is not even a suggestion of any power in the legislature to take the city property and give it to an individual. The ruling made by this court, if adhered to, must rest upon the proposition that the legislature, at its sovereign pleasure, may dispose of the property not only of counties but of all the like corporations exercising any governmental functions. The school-funds and
127 are all vested in such corporations, and the same power as to the disposition of these funds and property must exist in the State as there exists as to the property of the counties.

If, as we suppose, without the act of 1872, this railroad-stock would have been the property of the county, and subject to no control by the State, except such as it could exercise over any of the other property of the county, then the right of the county was precisely of that kind in this stock when it was issued to it, and so remained.

But by the act of 1872 the State undertook to exercise over this stock a power it had not over this property, unless there was some difference in the equitable ownership of it and other county property. If the difference did not exist before the act of 1872, how could that act make the difference?

If without the act of 1872 the tax-payer had no individual interest in this stock, as distinguished from the general interest of the public, the State could give him no such individual interest, except on the theory that the State had the right of disposing of the stock. If it could be given to this class of individuals, what was
128 to prevent the State from cancelling it, giving it to a single individual, or to a church or other corporation?

The court say it was equitable to give the stock to the tax-payers &c.

This must mean that an individual having paid a tax, which has been by the taxing power invested in any species of property, has some equitable claim to the property, and this can only be true upon the hypothesis that the taxation is a robbery, and it is equitable to restore the stolen property. The same theory would apply with equal force to all the school-buildings, &c. They were built, at least most of them, by a special tax levied for that purpose, and those paying such taxes are equitably entitled to have the property acquired with their money returned to them, and keeping it from them is a continuing act of injustice.

The talk of this court as to the persons paying the taxes not getting any profits from dividends, because they may cease to be inhabitants of the county or cease to be owners of property, applies equally to those who pay the taxes to build the school-house in any district.

129 That the forcing men against their will, and under compulsion of the paramount authority, to pay a tax to aid in building a railroad—that is, to give their money to a private corporation, to force them to submit to this species of robbery for the benefit of thieving speculators, may not accord with equity; but that robbery does not become any the less such by the act of 1872. The one stretch of legislative power is not made equitable by another act in clear excess of such power.

Much is said about the duty of courts to hold a statute constitutional if not clearly a violation of the fundamental law. This doctrine has been carried in many cases to an extent which threatens to destroy the value of constitutional limitations. The judiciary, at least theoretically, is a co-ordinate branch of the government, and its highest and most imperative duty is to see that the legislative department does not overstep the limits set to its power.

Does it not fail in the performance of this duty when it resorts to all possible means of creating a doubt as to whether a statute may not be within the constitutional limits, and then deciding it to be so,

130 because a doubt, or something that stands for one, has been produced? Have not the courts occasionally emulated in this particular the most extravagant performances of juries in the application of the rule as to rational doubts in criminal trials? Does a court perform its functions, when seeking and producing some exceedingly subtle and to the ordinary mind unappreciable nicety, and on this founding a doubt as to the constitutionality of a statute, and then, because of such doubt, give its sanction to the legislative action?

These suggestions have been made because the tendency of the judiciary is strongly in the direction indicated, and may we be pardoned for suggesting that in the case at bar that tendency seems to have strongly operated?

This case, as will be recollected, was argued orally, or at least there was an attempt at such argument, but by the action of the court it was but an attempt. One hour, the time fixed by the court for the argument on either part, was too brief a time to permit a discussion

131 of the question presented and an examination of the authorities bearing upon it. There was possible only the merest skeleton of what such an argument ought to have been.

If there is a question that could be presented to the court which ought to be most fully and carefuly presented, and most deliberately considered and decided upon principles that will bear the test of future scrutiny, this is such a question.

The court say this question has not been directly settled by judicial decisions, the precise question never having been determined. As it at presents stands, there are on one side the opinion of three of the judges of this court, and on the other that of two of the judges of the same court, and the judge of the circuit court, from whose determination the appeal was taken. That is the opinion of three judges opposed by that of three other judges, the preponderance being only the difference in weight of the opinion of a judge of this court over that of a first-class circuit judge.

The court seems to have overlooked entirely the legislative pro-
132 vision as to how stock in a railroad company, subscribed by a county, should he held. Acts 1842, p. 17, § 61. By this counties were authorized to subscribe for stock, &c., the payment to be made by money raised by taxation, and such stock to be held "as individual stock is held." This applied to all stock which counties were then authorized to subscribe, and it has never been expressly repealed. It is in pari materia with the act under which this stock was subscribed, and not in conflict with it. It is not, therefore, repealed by implication, and has the same effect as if embodied in the latter act. Water Works Co. v. Burkhart, 41 Ind., 364.

Had the latter act provided the county should hold this stock "as individual stock is held," would there have been even the semblance of a doubt that the legislative control over it would exceed the legislative power over the other property of the county? Does not the act of 1842 make, as to this stock, a contract between the State and county, as to how this stock shall be held, within the protection of the constitution?

133 We ask attention to this statute, as it removes the doubt as to how such stock is to be held, and the ruling made rests on this doubt. We had supposed this legislative declaration of how it should be held was only putting into words a statement of the legal effect of the subscription and payment by a county for stock in a railroad company.

On the same day on which the opinion of this court was filed, the supreme court of New Ham'shire decided a case in which substantially the same question was determined, by an undivided court, and in which the same conclusion, and by substantially the same reasoning, was reached as that at which the minority of this court arrived.

The time has long passed when there could be any urgent reason for action in this case, and may we not ask for a rehearing, and that a final determination of this case shall not be made, except after time for the most careful examination?

We do this, believing that, on further reflection, the reasoning and conclusions of the minority of the court will be found by all the
134 more satisfactory, and in accord with what has, by the bench and bar, been almost universally regarded as the constitutional limitation on the power of the legislature over the property of cities, counties, and other like corporations.

We have not attempted any review of the authorities bearing on the question in the case, but have only offered some suggestions, which we hope may induce the court to grant a rehearing, and then, after permitting a full discussion, again consider the question.

Respectfully submitted,

ROB'T JONES,
Z. & S. P. BAIRD,
WILSON & ADAMS,
Attorneys for Appellee.

And afterwards, to wit, on the 22d day of May, 1874, came the parties, by their attorneys, and the court, being sufficiently advised, overruled appellee's motion and petition for a rehearing heretofore filed in said cause:

135 It is therefore considered by the court that the judgment of the court below in the above-entitled cause be in all things reversed with costs, and the cause remanded, with instruction to dismiss the complaint. All of which is ordered to be certified to said court.

And it is further considered by the court that the appellant recover of the appellee the sum of dollars and cents for his costs and charges in this behalf expended.

136 And afterwards, to wit, on the 25th day of June, 1874, come the appellees, by their attorneys, and file their motion and petition for citation and writ of error; which are in the words and figures following, to wit:

In the Supreme Court of the United States.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, plff. in error,
vs.
MARTIN LUCAS, TREASURER OF TIPPECANOE COUNTY, INDIANA, deft. in error.
} Error to the supreme court of Indiana.

Petition of the Board of Commissioners of Tippecanoe County, plaintiff in error, for allowance of writ.

To the honorable James S. Worden, chief-justice of the supreme court of the State of Indiana:

Your petitioner, the Board of Commissioners of Tippecanoe County respectfully represent that heretofore, to wit, on the 10th day of July, 1873, your petitioner, the plaintiff in error, commenced an action against the defendant in error, Martin Lucas, as treasurer of said county,

137 in the Tippecanoe civil circuit court, in the State of Indiana, and that such proceedings were had in said court in said action that thereafter, to wit, on the 24th July, 1873, it was ordered and decreed by said Tippecanoe civil circuit court, as follows: "That the defendant (the defendant in error) be, and he hereby is, enjoined and restrained from issuing any certificate or certificates, to any person or persons, such as he is required to issue to tax-payers by the act of the general assembly of this State approved December 17th, 1872, and entitled "An act to require railroad companies to issue stock paid for by taxes voted in aid of the construction of their railroads to the tax-payers or their assigns, and to issue unclaimed stock for the benefit of the common-school fund, and declaring an emergency."

And your petitioner further says that thereafter, to wit, on the day and year last aforesaid, the said Martin Lucas, the defendant in error, under and in accordance with the practice in the State of Indiana, appealed from the said decree of the said Tippecanoe civil

138 circuit court to the supreme court of the State of Indiana, which is the court of last resort in said State, and that upon such appeal such proceedings were had thereafter, to wit, on the 17th day of March, 1874, said supreme court delivered an opinion reversing the judgment of the said Tippecanoe civil circuit court, which appears in the record of said cause, and to which your petitioner refers; and that thereafter, to wit, on the 7th day of May, 1874, your petitioner, under and in accordance with the practice in the said State of Indiana, filed a petition for rehearing in said cause, which petition for rehearing

the said supreme court afterwards, and on the 22d day of May, 1874, overruled, and rendered final judgment of reversal, and for costs in said appeal against your petitioner.

Your petitioner says that there is manifest error in the judgment and proceedings of said supreme court in this, that said supreme court in its decisions of said cause applied and enforced as valid against plaintiff in error the act of the general assembly of the State of Indiana above referred to in this petition as approved December 17, 1872.

139 Whereas your petition' says that said act of said general assembly of the State of Indiana is and was so applied to your petitioner in said cause inoperative and invalid in this, to wit, that the same is in conflict with section 10, article II, of the Constitution of the United States of America, which prohibits a State from passing a law "impa'ring the obligation of contracts."

Your petitioner avers that the validity of the act of the general assembly of the State of Indiana above referred to, as approved December 17th, 1872, in view of the operation and effect thereon of said section 10, article II, of the Constitution of the United States of America, was and is involved in said cause, all of which manifestly appears by the record and proceedings in said cause.

Your petitioner respectfully represents that the decision of the supreme court of Indiana in said cause is in violation and in plain contradiction of said section 10, article II, of the Constitution of the United States of America.

Your petitioner therefore asks that, to the end that said error of the said supreme court of Indiana may be corrected, *that* your honor

140 allow a writ of error in said cause from the Supreme Court of the United States, in order that said cause may be removed to said court and said error reviewed and corrected therein, and that your honor will sign and cause to be issued a citation to said defendant in error, commanding him to be and appear in the Supreme Court of the United States, on the first day of the next term thereof, to do and receive what may be adjudged in said court in said cause.

WILSON & ADAMS,
R. JONES,
Z. & S. P. BAIRD,
Attys. for Plft. in Error.

In the Supreme Court U. S. Error to the supreme court of Indiana.

The undersigned, chief-justice of the supreme court of Indiana, having on this 25th day of June, 1874, examined the foregoing petition, do allow the writ of error therein referred to, and order that the same be issued in accordance with the prayer of said petition.

In testimony whereof I have hereunto subscribed my name at Indianapolis, at chambers, the day and year last above written.

JAMES L. WORDEN.

141 And on the same day the following writ of error was filed in said court, to wit:

UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the supreme court of the State of Indiana, greeting:

Because on the record and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court, before you, between the Board of Commissioners of Tippecanoe County and Martin Lucas, treasurer of Tippecanoe County, in the State of Indiana, the said

supreme court of Indiana, being the highest court of law in the said State in which a decision would be had in said suit, a manifest error had happened, to the great damage of the said The Board of Commissioners, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,

142 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the day of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, this 25th day of June, A. D. 1874.

[L. S.] J. D. HOWLAND, *Clerk.*

And at the same time a copy of the above and foregoing writ of error was lodged in said court, in pursuance of the statutes of the United States, by the plaintiffs in error, as notice to the defendants in error.

143 And on the same day the following citation was issued from said court, to wit:

UNITED STATES OF AMERICA, *ss:*

To Martin Lucas, treasurer of Tippecanoe County, Indiana, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the said supreme court of Indiana, wherein the Board of Commissioners of Tippecanoe County is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment mentioned should not be corrected and speedy justice should be done to the parties in this behalf.

Witness the honorable James L. Worden, chief-justice of the supreme court of Indiana, this 25th day of June, 1874.

JAMES L. WORDEN.

Which citation contains an endorsement as follows, to wit:

144 THE STATE OF INDIANA,
Tippecanoe County, ss:

Personally appeared before me, Daniel Royse, clerk of the civil circuit court of Tippecanoe County, in the State of Indiana, Samuel P. Baird, one of the attorneys for plaintiffs in error named in the within citation, on this first day of July, A. D. 1874, who, being duly sworn by me, upon his oath says that he served the within citation on Hiram N. Chase, one of the attorneys of record for the defendant in error, and also on the defendant in error, Martin Lucas, on the day and year above named, by reading said citation to each and by leaving a copy thereof with each.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in La Fayette, this 1st day of July, A. D. 1874.

DANIEL ROYSE, *Clk.*
F. W. CHASE, *Deputy.*

And on the same day the following appeal-bond was filed in said cause, to wit:

145 Supreme Court of the United States.

THE BOARD OF COMMISSIONERS OF Tippecanoe County
vs.
MARTIN LUCAS, TREASURER OF TIPPECANOE County, Indiana.

Know all men by these presents that we, The Board of Commissioners of Tippecanoe County, Robert Jones and John W. Heath, are held and firmly bound unto the above-named Martin Lucas, treasurer of Tippecanoe County, in the State of Indiana, in the sum of one thousand dollars, to be paid to said Lucas, to which payment, well and truly to be made we bind ourselves jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents, sealed with our hands this 24th day of June, 1874.

Whereas the above-named The Board of Commissioners of Tippecanoe County hath prosecuted a writ of error to the Supreme Court of
146 the United States, to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Indiana:

Now, therefore, the condition of this obligation is, that if the above-named Board of Commissioners shall prosecute its said suit to effect, and answer all costs and damages that may be adjudged or awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise in full force.

The Board of Commissioners of Tippecanoe County, Indiana,
By SMITH LEE, *Auditor, C'm'ter, D. D.* [SEAL.]
ROBT. JONES. [SEAL.]
JOHN W. HEATH. [SEAL.]

Sealed and delivered in presence of—
Z. BAIRD.

Taken and approved by me this 25th day of June, 1874.
JAMES L. WORDEN,
Chief-Justice of Indiana.

147 THE STATE OF INDIANA,
Supreme Court:

I, Charles Scholl, clerk of the supreme court of the State of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of the transcript of the record of the proceedings and judgment of the Tippecanoe civil circuit court in the above-entitled cause, as the same appears from the records in my office; also, a full, true, and complete copy of the proceedings and judgment of the supreme court, together with a full, true, and complete copy of all proceedings had in order to affect an appeal to the Supreme Court of the United States, to wit, the petition for the allowance of a writ of error, writ of error, copy of the writ of error, citation, and bond in the above-entitled cause, as the same appear from the records in my office.

In testimony whereof I hereunto subscribe my name and affixed the seal of said supreme court, at my office in the city of Indianapolis, this 29th day of June, A. D. 1874.

[SEAL.]
CHARLES SCHOLL,
Clerk S. C.

148 STATE OF INDIANA,
Supreme Court:

I, James L. Worden, chief-justice of the supreme court of the State of Indiana, do hereby certify that Charles Scholl, whose signature is affixed to the foregoing record, is clerk of the supreme court of the State of Indiana, and hath the keeping of the files, records, and proceedings of said court, and is by law the proper person to make out and certify copies thereof, and that full faith and credit are and ought to be given to his acts, attestations, done as aforesaid, and that his attestation to the record hereto annexed is in due form.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court to be affixed, this 2d day of July, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JAMES L. WORDEN, *C. J.*

149 Supreme Court of the United States, October term, 1874.

THE BOARD OF COMMISSIONERS OF THE county of Tippecanoe *vs.* MARTIN LUCAS, TREASURER OF SAID COUNTY. } Error to the supreme court of Indiana.

The said plaintiff in error says that there is manifest error in the foregoing record & proceedings of the supreme court of Indiana, in this, to wit:

I. The said supreme court of Indiana erred in reversing the decree & judgement of the Tippecanoe civil circuit court, granting & decreeing an injunction in said case, which is recited in said record, and in, in pursuance thereof, rendering final judgement of reversal in favor of the defendant in error against the plaintiff in error, and that the action commenced by the plaintiff in error in said civil circuit court be dismissed, and for costs.

II. The said supreme court of Indiana erred in applying and enforcing a certain act of the general assembly of the State of Indiana, approved December 17th, 1872, & entitled "An act to require railroad companies to issue stock paid for by taxes voted in aid of the construction of their railroads to the tax-payers or their assign', and to issue unclaimed stock for the benefit of the common-school fund, and declaring an emergency," as valid, and as not in conflict with section ten,
150 article I, of the Constitution of the United States, or with any other provision of the Constitution of the United States, & as being in all respects binding and in force.

III. The said supreme court of Indiana erred in rendering judgement in favor of the defendant in error, whereas, by the law of the land, judgement should have been rendered in favor of the plaintiff in error.

Wherefor' the plaintiff in error prays a reversal of the said judgement of the said supreme court of Indiana.

SAML. A. HUFF,
W. O. WILSON,
Z. BAIRD,
R. JONES,
Counsel for Plff. in Error.

(Indorsement on cover:) No. 234. The Board of Commissioners of Tippecanoe County, plaintiff in error, vs. Martin Lucas, treasurer of Tippecanoe County, Indiana. Indiana sup. court. Filed 2nd September, 1874.

Supreme Court of the United States.

OCTOBER TERM. 1875.

No. 234.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, PLAINTIFFS IN ERROR,

versus

MARTIN LUCAS, TREASURER OF TIPPECANOE COUNTY, INDIANA, DEFENDENT IN ERROR.

Error to the Supreme Court of the State of Indiana.

ABSTRACT AND BRIEF OF PLAINTIFFS IN ERROR.

LAFAYETTE:
S. VATER, PRINTER AND BOOKBINDER.
1876.

Supreme Court of the U. S.

OCTOBER TERM, 1875.

THE BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY, INDIANA, PLAINTIFFS IN ERROR,

versus

MARTIN LUCAS, TREASURER OF TIPPECANOE COUNTY, INDIANA, DEFENDANT IN ERROR.

Error to the Supreme Court of Indiana.

ABSTRACT.

On the 10th day of July, 1873, the plaintiffs in error filed their complaint, in the Tippecanoe Civil Circuit Court, in the State of Indiana, against the defendant in error.

The averments of the complaint are substantially as follows: Under an act of the Legislature of the State of Indiana, entitled, "an act to authorize aid to the construc-"tion of railroads, by counties and townships taking stock "in, and making donations to, railroad companies," approved May 12, 1869, and in conformity to that act, a tax was voted and collected in Tippecanoe County, in aid of the LaFayette, Muncie & Bloomington Railroad Company, a corporation organized under the laws of said State, and engaged in constructing a railroad through said county.

The plaintiffs, during the years 1871, 1872 and 1873, subscribed and paid for stock in said railroad corporation to the amount of six thousand six hundred and ten shares at the par value of fifty dollars a share. The railroad corporation issued certificates to the plaintiff for the stock so subscribed and paid for. Afterwards the Legislature of the State of Indiana, passed another act, which was duly approved on the 17th of December, 1872, entitled, "an act "to require railroad companies to issue stock, paid for by "taxes voted in aid of the construction of their railroads, to "the tax payers or their assigns, and to issue unclaimed "stock for the benefit of the common school fund, and de-"claring an emergency." Before the defendant, as Treasurer of the county, had issued any certificates under the latter named act, as is contemplated by the first section of the act, the plaintiffs requested him not to issue any such certificates. The defendant disregarded this request, and issued a number of such certificates to different persons, and threatened to continue to issue to all persons who might apply for them, and who were entitled to receive the same by the provision of the latter mentioned act. The complaint concludes with a prayer, that the defendant be enjoined from issuing any certificate or certificates, under the first section of the latter named act, until the further order of the court, and that on the final hearing, said injunction be made perpetual, and for general relief—R., pp. 3, 4.

Such proceedings were had in the Tippecanoe Civil Circuit Court in said cause, that it was by said court, on the 24th day of July, 1872, ordered, adjudged and decreed that the defendant be, and he thereby was, enjoined "from "issuing any certificate or certificates, to any person or per-"sons, such as he is required to issue to tax-payers," by the act of the Legislature of the State of Indiana, approved December 17, 1872, and referred to in the complaint; said injunction to remain in force, until the fur-

ther order of said court; to which order of the court the defendant excepted, and prayed an appeal to the Supreme Court of Indiana, which was granted—R., pp. 5, 6.

The case was submitted to the Supreme Court of Indiana, at its November term, 1873, and on the 11th of March, 1874, that court delivered its opinion and judgment, which occupy the printed record in this court from pp. 9 to 20. At the conclusion of the opinion and judgment, the Supreme Court of Indiana uses the following language: "We "have not found any such repugnancy between the act in "question in this case and the Constitution of the United "States, or of this State, as in our opinion should render it "invalid. We must therefore hold the judgment of the "Circuit Court, enjoining the Treasurer of the county from "issuing certificates as required by the act, to be erroneous. "The judgment is reversed with costs, *and the cause re-* "*manded, with instructions to dismiss the complaint.*"—Buskirk and Pettit, JJ., dissented to the majority opinion, and their dissenting opinion occupies the Record from pp. 20 to 39.

The plaintiffs on the 7th of May, 1874, filed in the Supreme Court of Indiana, according to the practice of that court, their petition for rehearing—R., pp. 39 to 43 inclusive. On the 22d of May, 1874, the Supreme Court of Indiana overruled the petition for rehearing, and rendered final judgment in the language following: "It is "therefore considered by the court, that the judgment of "the court below in the above entitled cause, be in all "things reversed with costs, and the cause remanded "*with instructions to dismiss the complaint*"—R., p. 44.

On the 25th of June, 1874, the plaintiffs filed their petition for the allowance of a writ of error from this court to the Supreme Court of Indiana, in this cause, in which after reciting the judgments and decrees of the Tippecanoe Civil Circuit Court, and the Supreme Court of Indiana, above set forth, they say: "That there is mani-

"fest error in the judgment and proceedings of the said "Supreme Court of Indiana, in this, that said Supreme "Court of Indiana applied and enforced as valid against "the plaintiffs in error, the act of the General Assembly "of the State of Indiana, approved December 17, 1872, "against the plaintiffs, whereas, said act was, and is, as so "applied to the plaintiffs in said cause, inoperative and in- "valid, and in conflict with Section 10, Article 1, of the "Constitution of the United States of America, which pro- "hibits a State from passing a law," "impairing the obli- "gation of contracts;" that the validity of the act of the "General Assembly, of the State of Indiana, approved "December 17, 1872, in view of the operation and effect "thereon of said Section 10, Article 1, of the Constitution "of the United States of America, was involved, and that "the decision of the Supreme Court of Indiana, in said "cause, is in violation and plain contradiction of said Sec- "tion 10, Article 1, of the Constitution of the United "States of America."

The petition concludes with a prayer for the allowance of a writ of error. On the day the petition was filed, the Chief Justice of the Supreme Court of Indiana indorsed on it a formal allowance of the writ of error therein prayed for—R., pp. 44 and 45.

Three causes of error are assigned in this court. We rely upon the second cause of error assigned, which is as follows:

2. "The said Supreme Court of Indiana erred in ap- "plying and enforcing a certain act of the General As- "sembly of the State of Indiana, approved December 17, "1872, and entitled, 'an act to require railroad companies "to issue stock paid for by taxes voted in aid of the con- "struction of their railroads, to the tax-payers, or their "assigns, and issue unclaimed stock for the benefit of the "common school fund,' and declaring an emergency, as "valid and as not in conflict with Section 10, Article 1, of

"the Constitution of the United States of America, or "with any other provision of the Constitution of the Uni- "ted States of America, and as being in all respects bind- "ing and in force"—R., p. 48.

It will promote perspicuity in the presentation of this case by giving a summary, as a part of the abstract, of the two acts of the General Assembly of the State of Indiana, referred to by the plaintiffs in their original complaint, filed in the Tippecanoe Civil Circuit Court, so far as their provisions affect the question under consideration.

The material provisions of the act of May 12, 1869, referred to in the original complaint, are as follows:

Section 1, Provides that whenever a petition shall be presented to a Board of Commissioners of any county, signed by one hundred or more free-holders of such county, asking said Board to make an appropriation of money to aid a railroad company, then duly organized under the laws of the State, for the construction of a railroad through such county, by taking stock in, or donating money to such company, to an amount specified in such petition, not exceeding two per centum of the value of the taxable property of such county, it shall be the duty of such Board of Commissioners to cause the same to be entered at full length upon their records.

Section 2, Provides that the Board of Commissioners shall thereupon order the polls, at the several voting places in said county, to be opened on a day to be named in the order, and the votes of the *legal voters of said county* to be taken upon the subject of appropriating money by such county, for the purpose of aiding in the construction of such railroad, as prayed for in the petition, the judges and inspectors of elections to be governed in the reception of votes by the laws then in force regulating general elections.

Section 3, Prescribes the notice and the mode of giving

it, which shall be given of the time and place of holding such election.

Sections 4, 5, 6, 7, 8, 9, 10 and 11, prescribe the mode in which such election shall be conducted, and the result certified to the Board of Commissioners.

Section 12, Provides that if a majority of the votes cast shall be in favor of such railroad appropriation, the Board of County Commissioners, at their regular June session, shall grant the prayer of said petition, and also prescribes the mode in which the money necessary to meet the appropriation shall be levied and collected.

Section 14, Provides that said Board of Commissioners, may, *after the assessment provided for shall have been collected*, take stock in such railroad company, and pay therefor when the same is taken, *out of the money so collected.*

It is not necessary to notice the other sections of the act. For the act at large, see 3, Ind. Statutes, supplement to Gavin & Hord, 389.

The material provisions of the act of the General Assembly, of the State of Indiana, approved December 17, 1872, referred to in the original complaint, are as follows:

Section 1, Provides that in all cases where stock has been taken by counties, and paid for from taxes levied and collected, under the provisions of the act of May 12, 1869, it shall be the duty of the Treasurer of the proper county, upon request, if made prior to the first day of January, 1874, to issue to the several tax payers, and to the personal representatives of such as may have died, a certificate, stating the amount of railroad tax paid by such tax-payer, the date of payment, and the name of the railroad company in which the tax was paid.

Section 3, Provides that the certificates and receipts provided for in the first section of the act, shall be assignable in writing, and any lawful holder thereof may present and surrender said receipts to the proper railroad company, at any time within four years after the tax for which they

were given was paid, in sums equal in amount to any number of shares in the capital stock of such railroad company, and it shall be the duty of such company to issue a certificate of paid up capital stock therein to the amount of the certificates and receipts so surrendered; *provided*, that the stock so issued being involuntary in its character, no personal liability shall attach to the original holder thereof, for any debt contracted by the railroad company.

Section 3, Provides that it shall be the duty of the Auditors of the several counties in which railroad taxes may have been collected and paid over for stock, under the provisions of the act of May 12, 1869, immediately after the expiration of the time for the surrender of the certificates and receipts by individuals to railroad companies, to ascertain from the books of the County Treasurer, and the books of the proper railroad company, what amount of stock has been paid for by taxes levied in the county, which has not been applied for by individuals, upon the surrender of such certificates and receipts, within the times limited for that purpose; and for such amount of unclaimed stock, the proper railroad company shall, upon the request of such Auditor, issue to the several civil townships in such county certificates of stock, according to a prescribed ratio of apportionment, which stock, with all dividends therein, shall be for the use of the public schools of such townships, and be a part of the school funds of such townships.

Section 5 provides that the issuing of stock to individuals or townships, for school purposes, by railroad companies, as provided for by the act, *shall operate to cancel, pro tanto, the stock held by any county, under the provisions of the act of May* 12, 1869; *and all stock standing in the name of any county, shall be the property of the individuals payiny therefor, and of the several townships for school purposes, as the case may be, after individuals entitled thereto shall fail* to apply therefor, during the time limited for that purpose.

For this act, at large, see pamphlet ed. of General Laws,

passed at the special session of the General Assembly of the State of Indiana, begun on the 13th of November, 1872, page 54.

BRIEF.

1. We are advised that adverse counsel will controvert the jurisdiction of this court, over this case, upon two grounds: 1st, that the record does not disclose a Federal question, arising under the 25th Section of the Judiciary act of 1789, or under the 2d section of the act of 1867, entitled "an act to *amend* an act, to establish the judicial "courts of the United States." 2d, that the judgment from which the writ of error in this case is prosecuted, is not a final judgment within the meaning of either of said sections of said acts.

The first ground we submit is untenable for the following reasons: The motion for a preliminary injunction in this case was asked for, upon the facts appearing upon the face of the complaint, filed in the Tippecanoe Civil Circuit Court, which was verified by affidavit. The defendant filed no affidavit calling in question the facts stated in the complaint, nor did he file any plea or answer in denial or avoidance of those facts. For the purpose of the motion, therefore, the averments of the complaint stood admitted. The facts stated in the complaint presented a solitary question of law, the constitutional power of the General Assembly of the State of Indiana to pass the act of December 17, 1872, divesting the plaintiffs of the stock in question. Admitting that a constitutional limitation, equivalent to Section 10, Article 1, of the Federal Constitution, appears in the constitution of the State of Indiana, or that there existed local legislation on the subject in Indiana, the jurisdiction of this court over the question would not be thereby impaired or abridged. It would nevertheless remain a question of Federal law. The question whether the act of the General Assembly of the State of Indiana, approved December 17, 1872, is in violation of Section 10, Article 1,

of the Federal Constitution, was necessarily presented by the averments of the complaint, and therefore, clearly appears, in the language of the 25th section of the Judiciary Act of 1789, "upon the face of the record."

Now, it is a cardinal rule, that it is the office of a pleading to state facts, and not conclusions of law. In this rule all the elementary writers on the subject concur.

The question, now under consideration, arose in the case of the Bridge Proprietors *vs.* the Hoboken Co., 1 Wallace, 116. In that case it was objected by the defendants, that the pleadings did not, in words, say that the state statute, the validity of which was called in question, conflicted with the Constituion of the United States, or point out the particular clause of the Constitution supposed to render the act void. Justice Miller, who delivered the opinion in the case, in relation to that objection said: "It would be "a new rule of pleading, and one altogether superfluous, to "require a party to set out specially the provisions of the "Constitution of the United States, on which he relies for "the action of the court in the protection of his rights. If "the courts of this country, and especially if this court, can "be supposed to take judicial notice of anything, without "pleading it specially, it is the Constitution of the United "States. And if the plaintiff and defendant in their pleadings make a case which *necessarily comes within some of "the provisions of that instrument*, this court, surely *can recognize the fact without requiring the pleader to say in words:* "This paragraph of the Constitution is the one involved in "this case." The learned judge then cites with approbation, the cases of Crowell *vs.* Randall, 10 Peters, 368, and Armstrong *vs.* the Treasurer of Athens County, 16 Peters, 281, and adds: "Now, although there are other decisions "in which it is said that the point raised must appear on "the record, and that the particular act of Congress, or part "of the Constitution supposed to be infringed by the State "law, ought to be pointed out, it has never been held that

"this should be done in express words. But the true and "rational rule is, that the court must be able to see clearly, "*from the whole record, that a certain provision of the con-* "*stitution or act of Congress, was relied on by the party who* "*brings the writ of error, and that the right thus claimed by him* "*was denied.*" This question was considered by this court in the late case of Murdock *vs.* City of Memphis, 20 Wallace, 590—in which case at pp. 635-6, the following propositions are laid down, as flowing from the second section of the Federal Judiciary Act of 1867 :

1. "That it is essential to the jurisdiction of this court "over the judgment of a state court, *that it shall appear* "*that one of the questions mentioned in the act must have been* "*raised, and presented to the state court.*

2. "That it must have been decided in the state court, "*or that its decision was necessary to the judgment or decree,* "*rendered in the case.*

3. "That the decision must have been agai nst the "right claimed, or asserted by the plaintiff in error, un- "der the Constitution, treaties, laws or authority of the Uni- "ted States.

4. "These things appearing, this court has jurisdiction, "and must examine the judgment so far as to en able it to "decide whether this claim of right was correctly adjudi- "cated by the state court."

It is thought that it is above abundantly illustrated, that the question under consideration, "was raised and presented to the Supreme Court of Indiana," and that "its "decision was necessary to the judgment rendered by that "court." Very clearly the judgment of t hat court was adverse to a right claimed by the plaintiffs under the Federal Constitution. The opinion delivered in this case by the Supreme Court of Indiana, which led to the judgment appealed from, and also the dissenting opinion of Buskirk and Pettit, JJ., are duly certified to this court as parts of the record. From these opinions, it very clearly appears

that the question discussed and decided by the Supreme Court of Indiana is, whether the act of the General Assembly of the State of Indiana, approved December 17, 1872, is in violation of Section 10, Article 1, of the Federal Constitution, forbiding the States to pass laws impairing the obligation of contracts. In the above cited case of Murdock *vs.* the City of Memphis, it it held that the 2d section of the Federal Judiciary act of 1867, so far as the subject matter to which it relates is concerned, was intended to be complete in itself, and repeals by implication the 25th section of the Judiciary Act of 1789, which relates the same subject matter. Accordingly, in the case last cited, it is said: "The omitted clause of the act of 1789, "declared that no error should be regarded as a ground of "reversal, than such as appears on the face of the record. "It is probable that in determining whether one of these "questions was actually raised and decided in the state "court, this court has been inclined to restrict its inquiries "too much by the express limitation of the inquiry *to the* "*face of the record.* What was the record of a case was "pretty well understood as a common law phrase, at the "time that statute was enacted. But the statutes of the "states, and new mode of proceedings in those courts have "changed and confused the matter very much since that "time. It is in reference to one of the necessities thus "brought about, that this court long since determined to "consider, as part of the record, the opinions delivered in "such cases by the Supreme Court of Louisiana, and "though we have repeatedly decided that the opinions of "other state courts, cannot be looked into to ascertain "what was decided, we see no reason why, *since this re-* "*striction is removed*, we should not so far examine those "opinions when properly authenticated, as may be useful "in determining that question. We have been in the "habit of receiving the certificate of the court, signed by "its chief justice, on that point, though not as conclvsive,

"and opinions are quite as satisfactory, and may more "properly be treated as parts of the record, than such cer- "tificates."

In Indiana, by constitutional provision, it is made incumbent upon the Supreme Court of the State, "upon the "decision of every case, to give a statement in writing, of "each question arising in the record of such case, and of "the decision of the court thereon—1 Gavin & Hord, 46, Article VII, Section 5. And according to the practice of that court, the decisions, so made, are spread by the clerk upon the records of the court, as parts of the proceedings of the day in which they are delivered, which proceedings are signed by the the chief justice—2 Gavin & Hord, p. 3, Sec. [redacted], 2, ib., p. 278, Sec. 583. In the case of the Grand Gulf Railroad & Banking Company *vs.* Marshall, 12 Howard 165. This court said: "The proceedings were under the "Louisiana law, and the the opinion of the court, accord- "ing to the practice in that State, is entered on the record, "and sets forth the principles of law upon which the "decision was made," It was therefore held in that case, that this court would look into the opinion delivered by the state court of Louisiana, to ascertain whether or no, a question was presented under the 25th section of the Federal Judiciary Act of 1789.

Again, the plaintiffs in error, in their petition for the allowance of a writ of error in this case, expressly base their claim for the allowance of the writ, on the ground that the Supreme Court of Indiana had erred in applying and enforcing as valid, the act of the General As sembly of the State of Indiana, approved December 17, 1872, and above in the abstract set forth, "Whereas, said act of said Gen- "eral Assembly, is, and was, as so applied, inoperative "and invalid in this, to wit, that the same is in conflict "with Section 10, Article 1, of the Constitution of the "United States of America, which prohibits a state *from* "*passing a law impairing the obligation of contracts.*"

Writs of error to state courts are not allowed as of right. A writ of error to a state court, unless allowed by a judge of this court, or the chief justice of the state court, confers no jurisdiction upon this court, and must be dismissed. The allowance of a writ of error, therefore, by the Chief Justice of the State of Indiana, was an official act, imposed upon him by law, and is equivalent to a certificate by the Supreme Court of Indiana, through the Chief Justice of that court, that the question of Federal law mentioned in the petition was involved in the case, Gleason *vs.* Florida, 9 Wallace, 779.

In the case of Murdock *vs.* the City of Memphis, *supra*, it is said: "We have been in the habit of receiving the cer-"tificate of the court, signed by its chief justice, on that "point, (the one under consideration,) though not as con-"clusive." Of course it is not insisted that the certificate of the state court, would in all cases, conclude this court, for it might appear from an examination of the record, that no question of Federal law could have arisen in the case. But in the case at bar, it appears from the record, that a question of Federal law not only might have arisen and been presented to the State court, but that such a question was necessarily involved, and its solution essential to the decision arrived at.

The second objection urged against the jurisdiction of this court, is that the judgment from which the writ of error is prosecuted, is not a final judgment within the meaning of the 25th section of the Federal Judiciary Act of 1789, or within the meaning of the 2d section of the Federal Judiciary Act of 1867.

The judgment of the Supreme Court of Indiana, appealed from is: "That the judgment of the court below "be in all things reversed, with costs, and that the cause "be remanded, *with instruction to dismiss the complaint*, and "that the appellant recover from the appellee his costs and

"charges, &c." The question arises, is this a final judgment within the meaning of the 2d section of the Federal Judiciary Act of 1867. The mandate to the court below to enter a judgment of dismissal was peremptory. If the plaintiffs, instead of prosecuting their writ of er ror to this court had, after the entry of the judgment of dismissal in the Tippecanoe Civil Circuit Court, taken a second appeal to the Supreme Court of Indiana, according to the practice of that court, they would not have been permitted to assign for error any rulings of the court below, except such as had occurred since the first appeal, nor would they have been permitted to assign for error that the court below had entered judgment in accordance with the mandate. This is also the practice in this court, and as it is believed, generally, in all courts of appellate jurisdiction. To require the plaintiffs, as a condition to their right to relief in this court, to again appeal from the order of the Tippecanoe Civil Circuit Court, dismissing the complaint, in accordance with the mandate, to the Supreme Court of Indiana, would be in contravention of the maxim *lex nil facit frustra, nil jubet frustra.* The Supreme Court of Indiana, has already, by the judgment, to correct which the writ of error in this case is prosecuted, made a final disposition, not only of the question involved in the case, but of the case itself, so far as it has the power to do so. If the Supreme Court of Indiana was right in its ruling upon the Federal question involved, the mandate to the court below to dismiss the complaint was eminently proper, for the plaintiffs could not have bettered the complaint by amendment. It was entirely within the province of the Supreme Court of Indiana, to direct the court below to dismiss the complaint. It is provided by the Indiana code of procedure, that when a judgment is reversed by the Supreme Court, and no new trial is required, the case shall be remanded to the court below, "with particular instruc-
" tions relative to the judgment to be rendered."—2 Gavin & Hord, p. 276, Sec. 570.

The numerous decisions of this court in cases of writs of error, and chancery appeals from the Circuit Courts of the United States, which are courts of original jurisdiction, are not strictly applicable. The Supreme Court of Indiana, has no original jurisdiction, except such as is given by express statute, which is of a very limited character. An appeal prosecuted to that court from the judgment of an inferior court, as in the case of a writ of error at Common Law, stands as a seperate suit. When the Supreme Court has acted, by reversing, or affirming the opinion of the court below, that appeal case is *finally* determined—2 Gavin & Hord, p. 269, sec. 550, *et sequente*. Montgomery *vs.* Jones, 5 Ind., p. 526. This court has not evinced an inclination to give the phrase "*final judgment*" as used in the 25th section of the Federal Judiciary Act of 1789 or in the 2d section of the act of I867, a technical or strict construction, but on the contrary has uniformly held that a judgment, which finally determines the merits of the controversy, in a given case, between the parties litigant, is a final judgment within the meaning of those sections—Whiting *vs.* the Bank of the United States, 13 Peters, 15. Forgay *et al.*, *vs.* Conrad *et al.*, 6 Howard, 202. French *vs.* Shoemaker, 12 Wallace, 86.

The rule upon this subject, as we gather it from the decisions of this court, is that when the highest judicial tribunal of a state reverses the decision of an inferior court, and remands the case for a new trial, or rehearing, or generally, for further proceedings, although a question of Federal law may be involved, such judgment of reversal is not a final judgment, within the sections of the acts of 1789 or 1867, above referred to, for the reason that in the court below the pleadings may be so amended, or on a new trial other proof supplied, so as to put the supposed Federal question out of the case; but if in such case, the court of last resort, not only reverses the judgment of the court below, but directs that court to enter a prescribed judg-

ment, not only disposing of the question of Federal law, against the party seeking its protection, but finally disposing of the case itself, then the jurisdiction of this court, to review such judgment of reversal, attaches. The distinction which we here make, is clearly drawn by this court in Parcels *vs.* Johnson, 20 Wallace, 653. In that case the defendent in error, as widow of her deceased husband, had instituted suit against the plaintiff in error, in one of the circuit courts of Adair County, Missouri, for the assignment of dower, in certain real estate. The circuit court gave judgment against her, which the Supreme Court of Missouri reversed, and ordered that the "cause be re-"manded to the Adair Circuit Court for *further proceedings* "*to be had therein, in conformity with the opinion of this court* "*herein delivered and filed.*"

In that case the *Chief Justice*, who delivered the opinion of the court said: "The judgment of the Supreme Court "of Missouri, brought up in this case, *is one of reversal only and remanding the suit to the inferior court for further proceed-*"*ings*, in accordance with the opinion delivered and filed. "The cause was sent back therefore, *for a new trial or a new* "*hearing.* Upon such trial or hearing the inferior court "can proceed to render a new judgment, not inconsistent "with the opinion, and that judgment may in its turn be "taken to the Supreme Court for examination. From the "record it appears that one of the defenses set up in the "answer, to wit, that which was based upon the implied "acceptance of one-third of the proceeds of the guardian's "sale in lieu of dower in the land, was not proven. *On a* "*new trial that proof may be supplied, and a judgment ren-*"*dered thereon satisfactory to the now complaining party. In* "*that manner the present supposed Federal question may be* "*put out of the case. So, too, the present pleadings may be* "*amended, and a new case made, which will render unneces-*"*sary, the consideration of any question that can give this court* "*jurisdiction.*" Now none of the objections urged in the

foregoing opinion to the jurisdiction of this court over that case, exist in the case at bar, and the opinion in that case, carries a necessary inference in favor of the jurisdiction in this case. In the case at bar the mandate to the court below to dismiss the case was peremptory, and the plaintiffs were not therefore, privileged in the court below to supply new proof, or to so amend their pleadings as to put the question of Federal law out of the case.

Upon the grounds stated in the foregoing opinion, the case at bar is clearly distinguishable from the case of Verden *vs.* Coleman, 18 How, 86, relied upon by adverse counsel, and other cases of the same class.

We think that this court has decided the precise question under consideration, in accordance with the views above expressed, in the late case, (not yet reported,) of Atherton *vs.* Fowler *et. al.*, error to the Supreme Court of California. In that case it is said: "The plaintiffs in error claimed "title to the pay in controversy, in consequence of alleged "rights acquired under the act of Congress, passed March 3, 1863, entitled, 'an act to grant the right of premption "to certain purchasers in the Soscol Ranch, in the State of "California.' The decision of the State court was against "their title. This presents a question within the jurisdic- "tion of this court. The judgment of the Supreme Court "is the final judgment in this suit within the meaning of "the act of Congress. It reversed and modified the judg- "ment below, *and did not permit further proceedings in the "inferior court. No discretion was left in the court below,*" We cite the above case from the Central Law Journal.

The decision seems to have been made in October, 1875. The case so clearly controls the one at bar, that remarks to illustrate its application would be useless. Moreover, the allowance of a writ of error by the Chief Justice of the Supreme Court of Indiana, is equivalent to a certificate by that court, that according to its practice, the judgment from which the writ of error is prosecuted is a final judgment.

II. The question arises, is the act of the General Assembly of the State of Indiana, approved December 17, 1872, above in the abstract, referred to, in violation of Section 10, Article 1, of the Federal constitution. The plaintiffs are a municipal corporation of the State of Indiana, exercising delegated legislative, judicial and executive powers, within the territoral limits of the county of Tippecanoe, in that State—1 Gavin & Hord, p. 247, *et sequente.* Section 5 of the act provides: "Such commissioners shall "be considered a body, corporate and politic, by the name "and style of the county of ———, and as such, and in "such name, may prosecute and defend suits, *and have all* "*other duties, rights and powers, incident to corporations, not* "inconsistent with the provisions of this act."

The act approved May 12, 1869, empowered the plaintiffs to take in their corporate name, and pay for, the stock in controversy, and to raise the necessary funds for that purpose, by taxing the polls and property of the county, when authorized to do so by a *majority of the legal voters of the county.* In pursuance of that act the plaintiffs did subscribe and pay for the stock in controversy, and took certificates therefor, in their corporate name. The question therefore, is clearly presented, whether the property which the plaintiffs thus acquired in the stock could be taken from them in the manner proposed by the act of the General Assembly of the State of Indiana, approved Dec. 17, 1872; whether the legislative control over property acquired by a municipal corporation is quite without limit, and without the protection of the clause of the Federal constitution forbiding a state to pass laws impairing the obligation of contracts. Upon that question the judges of the Supreme Court of Indiana divided in opinion, three being in favor of reversing the decision of the Tippecanoe

Civil Circuit Court, granting the injunction, and two for affirming it. That court being as nearly equally divided as under its organization it could be, and the question being one of great practical importance, provoked an elaborate and exhaustive discussion of the question, which greatly abridges the labor of this argument. I adopt the dissenting opinion of Buskirk and Pettit, JJ., as a part of this argument. It reads as follows:

"The facts of the case and the question of law arising on the record sufficiently appear, in the opinion of the majority of the court, and need not be restated. The cause was tried before Judge Vinton, who delivered a very able and exhaustive opinion in reference to the constitutionalty of the law in question. We fully concur in the views expressed by the learned judge, and make his opinion a part of this dissenting opinion, and which is as follows:

"This is a complaint for an in injunction. I am asked to enjoin the defendant, as the treasurer of said county, from issuing such certificates as are contemplated by 'An act to require railroad companies to issue stock, paid for by taxes, voted in aid of the construction of their railroads to the tax-payers or their assignees, and to issue unclaimed stock for the benefit of the common school fund,' &c., approved December 17, 1872, on the sole ground that said act is unconstitutional and void. The complaint, in my judgment, fully presents the point above indicated, and I am compelled, in the discharge of my official duty, to adjudge it. I am aware that even courts of the highest character for learning, integrity and ability have ever approached questions involving the validity of legislative enactments impressed with a sense of deep responsibility. A judicial question of greater gravity or more serious import cannot arise under our system of government.

"I am not, I trust, insensible to the importance of the question and the magnitude of the interest involved in this case.

"I have given the subject the best examination I could in the time allowed me. If, in the conclusion to which I have arrived, I have erred, I am glad to know that the

error can be speedily and effectively remedied by a higher court. I have done the best I could, and that as I understand it, embraces the whole of my official duty.

"Since the only question before me is one of constitutional power, it is manifest that a discussion of the fitness or unfitness of the members of the board of commissioners for the position they hold is wholly out of place, nor can the justice or injustice, policy or impolicy of the act in question have anything to do with the solution of the question.

"The question under consideration arises as follows: In 1869 the legislature passed an act authorizing aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies. Under this act such steps were taken as resulted in a submission of the matter whether a railroad appropriation should or should not be made in aid of the LaFayette Muncie & Bloomington Railroad Company to a vote of the people in this county, which resulted in favor of such appropriation.

"Thereafter the board of commissioners levied the tax as provided in section 12 of said act.

"Section 14 of said act provides that 'said board of commissioners may, after the assessment herein provided for, or any part thereof, shall have been collected, take stock in said railroad company, from time to time, in the name of the proper county or township, as the case may be, and pay therefor when the same is taken out of the moneys so collected as aforesaid, or they may donate such moneys to such company for the purpose of aiding in the construction of such road, and pay the same over from time to time, as the work progresses, as hereinafter provided.'

"As the taxes thus levied were collected from time to time and during the years 1871 and 1872 and 1873, the board of commissioners subscribed and paid for stock in the LaFayette, Bloomington and Muncie Railroad Company, a railroad corporation duly organized under the laws of this state. At the time such smbscriptions and payments were made said railroad company issued its stock certificates to the board of commissioners for 6,610 shares of stock at the par value of fifty dollars per share.

"It is claimed by the plaintiff's counsel that this stock

became and is the property of the county, and that her beneficial ownership cannot be taken away and given to private citizens for private purposes, as is attempted to be done by the act of December 17, 1872, as above referred to.

"It is admitted on all sides that the plaintiff is a corporation.

"Corporations are of various kinds, but the only division that need be referred to in this discussion, is that of public and private corporations.

"As to the latter kind, the law is well settled by a long line of decisions, commencing with the celebrated Dartmouth College case, that their rights, privileges, and franchises are protected from legislative interference by the clause of the Federal constitution which forbids a state from passing any law 'impairing ihe obligation of contracts.'

"It is well settled that a strictly public corporation, whatever that may be under the authorities, is wholly subject to the legislative control, except as to certain limitations as to proprietary rights.

"In the case of Tenet *vs.* Taylor, 9 Cranch, p. 43, Mr. Justice Story, in the only opinion delivered, uses this language: 'In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge or restsain them, securing, however, the property for the use of those for wh om, and at whose expense it was originally purchased.'

"Again, in the Dartmouth College case, 4 Wheaton, at page 663, Mr. Justice Washington says: 'But the case of Tenet *vs.* Taylor, 9 Cranch, p. 43, fully supports the distinction above stated between civil and private corporations, and is entirely in point. It was decided in that case that private corporations created by the legislature may loose *iis* franchises by misuser or non-user, and they may be resumed by the government under a judicial judgment of forfeiture. In respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom, and at whose expense, it was purchased.'

"In the same case, at pages 694 and 695, Judge Story says:

"'It may also be admitted that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations the legislative power is so transcendent that it may at its will take away the private property of the corporation or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporation? If a municipal corporation be capable of holding devises and legaci's to charitable uses, (as many municipal corporations are,) does the legislature under our form of limited government, possess the power to seize upon those funds and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and devisors? From the very nature of our governments the public faith is ple'ged the other way, and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion in other cases to express their opinion on this subject, and there is not the slightest inclination to retract it.'

"The limitation of the legislative power, as expressed by Judge Story, has been generally received and quoted as the true rule on the subject. Thus Chancellor Kent, in the second volume of his commentaries, at page 305, declares: 'In respect to public or municipal corporations which exist only for public purposes, as counties, cities, and towns, the legislature, under proper limitations, have a right to change, modify, enlarge, restrain, or destroy them, securing, however, the property for the use of those for whom *they were* purchased. A public corporation instituted for purposes connected with the administration of the government may be controlled by the legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public.'

"Judge Cooley, in his work on Constitutional Limita-

tions, quotes the rule as laid down by Judge Story with entire approbation. Under the head 'Legislative control of corporate property,' at page 235, he declares: "The legislative power of the State controls and disposes of the property of the state. How far it can also control and dispose of the property of those agencies of government which it has created and endowed with corporate powers is a question which, happily, there has been very little occasion to discuss in the courts. Being a mere agency of government, it is evident that the municipality cannot itself have the complete and absolute control and power of disposition of its property which is possessed by individuals over their own. For it can hold and own property only for corporate purposes, and these purposes are liable at times to be so modified by legislation as to render the property no longer available. Moreover, the chartered rights may altogether be taken away; and in that case the legislature has deprived the corporation of its property by depriving it of its corporate capacity to hold it, and in many ways, while the corporation holds and enjoys property, the legislature must possess power to interfere and control, at least incidentally; for the mere fact that the corporation possesses property cannot deprive the state of its complete authority to mould and change the corporate organization and enlarge or diminish its powers which it possessed before. But whether the state can directly intervene and take away the corporate property, or convert it to other uses than those for which it was procured, or whether on repealing a charter of incorporation it can take to itself the corporate property and dispose of it at discretion, are different questions from any raised by the indirect or incidental inferences referred to.'

"This author then quotes the rule laid down by Judge Story, and by Judge Washington in Dartmouth College case, and then proceeds as follows:

"'The rule upon the subject seems to be this, when corporate powers are conferred, there is an implied compact between the State and the corporators that the property which they have the capacity to acquire under their charters shall not be taken from them and appropriated to other usee, If the State grants property to the corporation, the grant is an executed contract, which cannot be revoked. The rights acquired, either by such grants or by

any legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away. Nevertheless when the corporate powers are repealed the corporate ownership ceases, and by modification of corporate powers the legislature may in other cases affect and divest the rights of individual corporators, so far as they can be said to have any rights in public property, and in other ways and by direct intervention the legislature may exercise control over the disposition and use of property, subject to the restriction that it must not be diverted to a use substatially different from that for which it was acquired.

"Judge Dillon, in his work Municipal Corporations, at page 8, holds this language: 'The weight of opinion seem to be in favor of the doctrine that there may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature, though not beyond legitimate legislative authority and control; but in the present state of decisions the subject cannot fairly be said to be settled.'

"I know of no American text-writer who asserts a contrary view, and I know of but one decision (Darlington *vs.* New York, 31 N. Y., p. 164,) where the legislative control is claimed to be quite without limit.

"Before proceeding to the cases, so far as they exist, in which this rule has been applied, it will be well to examine our own decisions, to see whether they have recognized the rule laid down by Judge Story. If they have, notwithstanding its repudiation by so learned a jurist as Judge Denio, (in the case last referred to,) I am bound by it and its fair logical consequences.

"In the case of Armstrong, *et al.*, *vs.* The Board of Commissioners of Dearbon County, 4 Blackford, 208, a case growing out of the relocation of a county-seat, the rule as laid down by Story and Kent is quoted with approval. The court says: Our counties are all incorporated. They are public corporations, created for public political purposes, and the whole interest in them belongs to the public. The legislature have therefore, in the language of Kent, under proper limitations, the right to change, modify, enlarge or restrain them, securing however, the property for the uses of those or whom it was purchased.'

"In Edwards *vs.* Jaggers, *et al.*, 19 Indiana, 406, a case

involving the validity of a clause in our constitution of 1852, authorizing the sale of county seminaries, Worden, judge, speaking for the court says:

"'The language of the Supreme Court of the United States in the case of Terret *vs.* Taylor, 9 Cranch, 43, is in point here. The court says: 'In respect to public corporations, which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, *securing, however, the property for the use of those for whom, and at whose expense it was originally purchased.*' This emphasis is Judge Worden's.

"In the case just quoted from, the corporation before the court namely, the Switzerland County Seminary, was held to be a private eleemosynary corporation, and that its character and the rights accruing under it were protected by the Federal constitution. The point there ruled does not directly affect the question before me, but the limitation upon legislative supremacy, as announced by Story, is recognized with emphasis.

"Numerous adjudged cases lay down this rule of limitation, but I shall not take the trouble to cite them, except as they may hereafter be referred to, to illustrate the application of the principle. In my judgment, the rule is abundantly established by authority, and is founded in reason and sound policy.

"Is this rule to be applied in this case?

"It is contended by plaintiff's counsel that under our constitution and under the peculiar powers conferred upon county commissioners by the act providing for the organization of county boards, approved June 17, 1852, they are, as to certain powers conferred, (including the power to acquire railroad stock,) private corporations.

"It is claimed that this act, and especially the fifth section thereof, greatly enlarges the powers of county corporations, and endows them with more vigorous corporate life than they had ever possessed in this state prior to its enactment.

"Section fifth reads: 'Such commissioners shall be considered a body corporate and politic, by the name and style of the Board of Commissioners of the County of——, and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to

corporations not inconsistent with the provisions of this act.'

"It is also contended that a distinction is to be drawn between such powers as are conferred upon the plaintiff for public purposes exclusively and such as are conferred for private advantage and emolument; that the former powers belong to the plaintiff in its public, political or municipal character, but as to the latter, though the public may derive a common benefit therefrom, the plaintiff is *quoad hoc* to be regarded as a private corporation. This distinction is taken and maintained by numerous cases, though there are some that hold that no such distinction can or does exist.

"If this distinction may be relied on as the basis of a decision in any case where the powers of a public corporation are under review, it seems quite clear to me that it can be relied upon here. I say this upon the following considerations: The Constitution of Indiana expressly forbids that state to become a stockholder in any corporation or association. Section 12 of article 11 reads thus: 'The state shall not be a stock-holder in any bank after the expiration of the present bank charter; nor shall the credit of the state ever be given or loaned in aid of any person, association, or corporation; *nor shall the state hereafter become a stockholder in any corporation or association.*'

"The constitution, in other parts of it, as construed by the Supreme Court, declares that counties may become stockholders in a corporation if the stock is paid for at the time of the subscription. According, then, to the fundamental law, a county may, but the state may not, become a stockholder in a railroad company. The section of the constitution authorizing counties to take stock is not self-executing. It requires the affirmative action of the Legislature authorizing the Board of Commissioners to subscribe for stock. Such an enabling act is found in the railroad aid law of 1869. It has been held to be constitutional to wield the taxing power of the state in aid of a railroad company, for the reasons therefore given at large by the Supreme Court.

"Now, the county levying the tax to create a fund with which to made a donation to or take stock in a railroad company is using a power given it as a public corporation; but in subscribing for stock in such company, to be held for its private advantage and emolument, it may be acting as a private corporation.

"At all events, it is difficult to see how a county holds such stock, in the strict sense spoken of in the books, as public property.

"In legal contemplation, the Board of Commissioners of a county is the county, (4 Ind., 315,) and, in my judgment, when such board acquires stock in a railroad company, under the constitution and the act of 1869, it takes it and holds it, not strictly as an instrument of governmental agency, but as the trustee of the inhabitants of the county; not as property held for state purposes, but as properly held for the benefit of the people of the county.

"I do not mean to say that the Board of Commissioners took and held this stock, to all intents and purposes, as an individual holds his property, for under the authorities I do not think such a doctrine is maintainable. But I hold that stock thus acquired by a board is not acquired or held for public purposes, in the sense that the power of the Legislature over it is omnipotent.

"But whatever may be said of the soundness of an argument or a decision based upon the double character of the plaintiff, the one governmental, legislative, or public, the other in a sense proprietary or private, I feel I am standing on absolutely sure ground when I rely upon the rule limiting legislative omnipotence, as laid down by those great and imperishable lights of the profession, Judge Story and Chancellor Kent.

"Does this rule, fairly applied, render the act in question clearly and palpably in conflict with the clause of our state constitution which declares that no law impairing the obligation of contracts shall ever be passed?

"I think it plain that the plaintiff acquired the stock in question by virtue of the contract with the railroad company. Here were two parties, the plaintiff on the one side and the railroad company on the other, each competent to contract as to the subscription of stock. At all events, the plaintiff paid the money to the company, and the company, in consideration thereof, issued to the plaintiff the stock certificates in question, and as between them these acts created reciprocal rights and obligations. It is not questioned that the legal title to the stock certificates for a large number of shares of stock in the LaFayette, Muncie and Bloomington Railroad Company was vested in the plaintiff, in trust for somebody, at the time the act of 1872,

was passed. For whom did the board hold this stock? Who were the beneficiaries?

"The defendant's counsel claim that, as to this stock, the plaintiff was the trustee for the persons who had paid the taxes with which the stock was purchased, and that, therefore, the statute does nothing more than compel the trustee to execute the trust in favor of the beneficiaries, and that in this view the statute is not only valid but highly just and commendable.

"No authority is cited in support of the assumption that the tax-payers above referred to were the only beneficiaries and I imagine none can be found, or the persistent diligence of the counsel would have supplied it. The inhabitants are the beneficiaries. The corporation known as the Board of Commissioners of Tippecanoe County, in my judgment, is the trustee, as to the property in question, and all other property which it has or can by law acquire, of the whole people of the county. Property is taxed to support the government, because the government secures and protects property. Property is taxed to build railroads, (so the theory runs,) because railroads enhance the value of property, and are otherwise of public benefit. When a tax payer pays a tax lawfully assessed for county purposes, into the treasury, he ceases to have any specific or individual interest in it, and it becomes the property of the county, for the benefit of all the people of the county.

"What specific or enforceable interest, distinct from the general public, did the largest tax-payer to the railroad appropriation have in the money he paid after it was in the treasury, or to the stock-certificates after they were purchased, prior to the act in question? Clearly and palpably none whatever. If he has any legal right to the stock in question over and above that of the poorest man in our midst, he has it by virtue of the act of 1872, that is claimed to be void.

"But, as a matter of fact, are the persons designated in the act as entitled to the stock the only ones who contributed to its purchase? Directly they undoubtedly are; but indirectly they certainly are not.

"The $373,000 voted to aid in the construction of the LaFayette, Muncie and Bloomington Railroad, though nominally laid on the property of the county, was, in fact, a burden laid on the productive industry, on the labor, of

the county. Tax burdens like this, though laid in the first instance on the property-holders, distribute themselves on the entire labor of the community, by a law as inevitable and uncontrollable as that which constrains water to find a common level. It is as impossible to ascertain with any degree of certainty who in reality shared the burdens of this tax as it is to ascertain who bear the burden of the wholesale-license tax to the United States Government, nominally paid by O. W. Peirce & Co. This firm paid the tax to the Government, but they charged the same, in whole or in part, upon the goods they sold, and these goods went, charged with the same, through all intermediate persons, till they reached the consumers, who finally shared, in whole or in part, in the original burden.

"The assumption of law, that the persons described in the act are the only beneficiaries, and the assumption of fact that they alone shared in the burden of the tax, are, in my judgment, wholly unfounded. The Board of Commissioners is the trustee of the inhabitants of the county, not some of them, but all of them are the beneficiaries.

"It was admitted, in argument by the defendant's counsel, that an act which should attempt to take this stock from the county and give it to an individual for his own use would be clearly beyond the legislative power. Yet, what is sought to be done by the act in question, when stripped of the specious and unfounded assumption that the persons described in the act are the sole beneficiaries, is just what is admitted could not be done.

"Could the Legislature, under the rule limiting its power, as laid down by Judge Story, and approved with emphasis by Judge Worden, of our own Supreme Court, constitutionally divest the county of its legal and beneficial ownership in this stock and give it to the individuals contemplated, to hold as their private property?

"If I am correct in the positions already laid down, the conclusion is inevitable that the act in question, when viewed in the light of this rule, is unconstitutional and void. That the legislature might change the trustee, or do many other things which need not be specified, so long as the uses to which the stock is voted are left intact, is admitted. But this act, divesting the beneficial ownership of the plaintiff and investing it in individuals, converting the public county use to individual private use, is, to my mind, clearly and plainly beyond the legislative power.

"Many authorities were referred to by counsel on both sides during the able and protracted argument, as bearing more or less directly upon the question in hand. I have given them all such examination as I could, but I have neither the time nor the ability to review them, nor would such review subserve any good purpose.

"I will, however, briefly alude to the case of the Town of Milwaukee *vs*, the City of Milwaukee, (12 Wisconsin, 93,) relied upon as most strongly in point by the plaintiff's counsel, and the case of Darlington *vs*. the City of New York, (31 New York, p. 164,) equally relied upon by the defendant's counsel.

"As to the opinion of Chief-Justice Denio, in the last case, it has already been said that it repudiates the rule of limitation so generally recognized by text-writers and adjudged cases, including the cases in our own court. He arrives at the conclusion that the legislative power over the property of public corporations is entirely without limitation. In my opinion, his conclusion is opposed to the great weight of the authorities, and is not, if I may be allowed to say so, sustained by the force of sound reasoning.

"The former case was decided by Chief-Justice Dixon, and the question as he put it, and which he discussed, must be admitted to be almost exactly in point in this case. The question that he examined was, whether the Legislature could, constitutionally, take property that belonged to the town (township) of Milwaukee by purchase and give it to the City of Milwaukee. He denies emphatically the power of the legislature to do this, and goes into a very elaborate and candid discussion of the whole question. But it is claimed that all Judge Dixon said on this subject was obiter, and ought not to have the force of authority. But the question was assumed to be in the case, and it must be admitted that its solution was decisive of it. The same criticism, urged against this case as authority, may be made with equal, if not greater, force to the decision of Judge Denio, in the case referred to. But whether what was said by Judge Dixon was said in the decision of a question neccessarily before him or not, his argument is in my judgment, sound, and his conclusion sustained by reason and the great weight of authority.

"From the examination I have been able to give the subject, necessarily limited, aided by the very able discuss-

ion had at the bar, I am of opinion that the act in question, so far as it affects the plaintiff in the matter complained of, is clearly and palpably unconstitutional and void, and that the defendent ought to be enjoined according to the prayer of the complaint."

The primary and controlling question in the case is whether the stock subscribed by the Board of Commissioners in the name of the County of Tippecanoe became the property of the county. The opinion of the majority of the court is based upon the theory that it did not; and it is manifest that if such theory is untrue, that the conclusion based thereon is unsound and cannot be supported. It is said in the opinion of the majority that "the tax, when collected, does not go into the county treasury; it does not become the property of the country."

We controvert both propositions. The tax, when collected, does go into the county treasury, and is retained by the treasurer until he is required by the warrant of the auditor to pay it out for the purpose for which it was levied and collected. Such warrant can only issue upon the order of the Commissioners. It is provided by the 12th section of the act authorizing aid to railroads that such "tax shall be collected in all respects as other taxes are collected for state and county purposes," Taxes collected for state and county purposes are paid into the county treasury, and are retained by the treasurer until paid out upon the warrant of the auditor. The difference is this: When taxes are collected for county purposes and paid into the county treasury, the money becomes a part of the general fund of the county, and may be expended for any legitimate county purpose; but the money collected under the railroad act is collected for a specific purpose, and is held in trust by the county until the commissioners have either subscribed for the stock or donated the money to aid in the construction of the railroad indicated. It is provided in the 18th section that upon the failure of the railroad company to commence work within one year, or to complete the road within three years, the money so collected shall go into the general fund of the county or township, as the case may be, and be used accordingly. The special tax is levied upon the taxable property and polls of the county, and is collected in all respects as taxes for state and county purposes, and is held by the county to be applied for the speci-

fied purpose, and if not so applied the money goes into the general fund of the county. If the money does not belong to the county, how can it be converted into the general fund of the county if not used for the purpose for which it was collected? If the Commissioners shall elect to donate the money to the railroad, then the money and all rights thereto pass from the county and become vested in the railroad. But if the Commissioners elect to subscribe for stock, then the subscription is to be made in the name of the county, and the railroad company is required to issue to and in the name of the county, certificates of stock.

Does not the county become a stockholder, and is it not entitled to vote at any meeting of the stockholders? The stock in railroad corporations is transferable upon the books of the company. Will any one doubt that the County of Tippecanoe might have sold and transferred the stock subscribed in her name, and that she could have vested a good title thereto in the purchaser? We presume no one can be found to question her power and right so to do. Has not the county been exercising her right as a stockholder in voting for the election of directors of the railroad company? Who ever called in question her legal right so to do? No one. But this further proposition is stated in the opinion of the majority of the court: "It does not thereby become the property of the county in the sense that it would if purchased with county funds, and the primary object was the purchase of stock for its own use."

We are unable to appreciate the distinction which is attempted to be drawn between the payment for stock out of the general fund of the county and out of the money collected upon the special tax. The money in each case is collected from the taxable property and polls of the county, and is collected in all respects the same. The money when collected for county purposes generally, may be expended for any and all county purposes. The money collected for a special purpose can only be expended for that purpose, until the railroad has forfeited its right thereto, when it becomes a part of the general fund. The only difference between the two funds is while they are held by the county. When either is paid out, it is paid as the funds of the county and for the benefit of the county. It is conceded in the above quotation that the county might have subscribed for stock and paid for it out of the general funds of the county, if a suffi-

ciency had been in the treasury, and that, in such case, the stock would have belonged to the county. We cannot see what difference it can make in the ownership of the stock whether it is paid out of the general fund, which has been raised by taxation, or out of the special fund raised by taxation. In either case the money belongs to the county, and the stock purchased therewith should belong to the county.

The constitutionality of the act of May 12, 1869, was sustained upon the ground that the 6th section of article ten of the constitution authorized a county to subscribe for stock in an incorporated company, on the condition that it was paid for at the time the subscription was made; and this express grant of power carried with it, by necessary implication, the power to adopt such means as may be adequate to accomplish the end proposed. It is a settled rule of construing a constitution that a court should look to the history of the times, and examine the state of things existing, when the constitution was framed and adopted. When the section of the constitution in question was framed and adopted, which empowers counties to subscribe for stock in an incorporated company, there was in existence, and had been for more than ten years, a statute which reads as follows:

"It shall be lawful for any county within the state to take stock in such association, (which association was organized to continue the construction of all or any part of the public works by private companies;) and for this purpose the several boards doing county business are hereby empowered to subscribe therefor, and to levy a tax as for county purposes, not exceeding one dollar on every hundred dollars of assessed property, to be applied for such object; and the county shall hold such stock as individual stock is held in such association."

It is reasonable to suppose that the 6th section of article ten was framed and adopted in view of, and in reference to the existing law and long settled practice of the state, and that it was intended that where a county should subscribe for stock in any incorporated company, that such county should hold such stock as individual stock was held in such company?

It is unreasonable to suppose that the framers of the constitution intended to provide that the county might use

the money which had been raised by taxation, and by right belonged to all the inhabitants of the county, in paying for stock which had been subscribed for, the title to which was to be vested in some other person. We think the true meaning of the constitution is that where a county should subscribe for stock the subscription should be made in the name of the county, and that the county should hold it as corporate property, and in trust for all the inhabitants of the county; that the county should be a stockholder, and have a voice and vote in the management of the incorporated company; and that the commissioners of the county might sell and assign such stock, and that the proceeds of the sale should go into and constitute a part of the general fund of the county. The act of the 28th of January, 1842, provides that a county might take stock in such an association, &c. The act of the 14th of February, 1848, relating to the Ohio & Mississippi Railroad, provides that "it shall be lawful for the county commissioners of any county in the State of Indiana through which said railroad passes, for and on behalf of such county to take stock," &c. The LaFayette, &c., R. R. Co. *vs.* Geiger, 34 Ind., 206. The 6th section of article ten provides that a county may subscribe for stock, &c.

The act of May 12, 1869, provides that the commissioners shall subscribe for stock in the name of the county. Is it not plain and obvious that the constitutional convenvention and the Legislature intended that when money which had been raised by taxation was used in paying for stock which had been subscribed for in an incorporated company should be taken in the name of the county, and held and disposed of as other corporate property? We deny the power of the Legislature to require or authorize a county to pay for stock with money which has been procured by taxation, and appropriate the stock to a private use. If the Legislature had possessed the power, and had provided that the stock should be taken in the name of the sheriff of the county, the stock would still have belonged to the county, though held in trust by the sheriff, and could not have been appropriated to any private use. In such case such sheriff would hold such stock charged with a trust so sacred that even the Legislature could not destroy it and convert it to private uses.

The opinion of the majority of the court seems to have

been greatly influenced by the alleged fact that the act of May 12, 1869, does not provide how the stock to be subscribed for by the county shall be held, how it shall be managed, or to what purpose it or its dividends shall be applied. The act of May 12, 1869, provides that the stock must be taken in the name of the county; and as it was paid for with the funds of the county, it must necessarily be held for the use of the county. It was wholly unnecessary that the act should provide how it should be managed, or to what purpose it or its dividends should be applied. An ample provision had already been made for such managment and use. Section 10 of article 6 of the constitution provides that the general assembly may confer upon the boards doing county business in the several counties powers of a local administrative character.

An act approved June 17, 1852, provides that there shall be organized in each county in this state a Board of Commissioners for transacting county business, to consist &c. It is provided by ihe 12th section of said act that "such commissioners, in their respective counties, shall have power at their meetings: 1. To make orders respecting the property of the county, in conformity to law," &c. By the above act the Board of Commissioners of Tippecanoe County were vested with full and ample power to manage and control the stock subscribed for in the name of the county and to appropriate to legitimate county purposes the proceeds or dividends arising therefrom. It is a settled rule of construction that the Legislature is presumed to have in view, in the passage of a law, all existing laws relating to the same subject.

Having arrived at the conclusion that the stock subscribed for in the name of the county of Tippecanoe, became the property of the county, and that the right and title thereto was vested in the county, we proceed to inquire whether the Legislature possesses a power to divest a vested right, or, in other words, to take from the county of Tippecanoe the property which belongs to her, and give the same to private citizens for private purposes, thus defeating the public purpose to which it had been dedicated.

Before we proceed to an examination of the authorities bearing upon the question under examination, we desire to express our appreciation of the fairness of the majority

of the court in citing and quoting from authorities bearing upon both sides of the question in dispute. This action of the court will greatly relieve us of labor; but the proper illustration of our views render it necessary for us to make a brief reference to the authorities cited in the opinion of the court, and this we will do in the order in which the references are made.

Judge Cooley, one of the most eminent and distinguished writers upon constitutional law, deduces from all the authorities the rule that the Legislature may exercise control of the disposition and use of property belonging to a county subject to the restriction that it must not be diverted to a use substantially different from that for which it was acquired; that is to say, as we understand it, that if the stock in question was acquired with county funds, for county purposes, *that* it cannot be diverted to private uses.

The case of Darlington *vs.* the City of New York, 31 N. Y., 164, goes further than any American case in asserting the absolute and unrestrained control of the Legislature over property belonging to municipal corporations; but we are of opinion it does not go far enough to sustain the constitutionality of the law in question.

The question was in that case whether the Legislature possessed the power to make the property of the city liable to the payment of a judgment recovered against the city for damages sustained by a riot, and it was held that such power existed. The question was not whether the Legislature could take the property of the city and give it to private persons, but whether the property of the city was liable to be sold upon execution to satisfy a judgment against the city. The court held that the property of the city was subject to sale upon execution to satisfy such a judgment, in the same manner and to the same extent as upon any other judgment. It is plainly inferrable, from the reasoning of the court, that an act would have been held unconstitutional which directed the appropriation of public property to private uses. The learned judge says: "Let us suppose the city to be the owner of a parcel of land not adopted to any municipal use, but valuable only for sale to private persons for building purposes, or the like. No one, I think, can doubt but what it would be competent for the Legislature to direct it to be sold, and the proceeds to be devoted to municipal or other public purpose within the city, as a court-house, a hospital, or the like."

We do not doubt the power of the Legislature to so far control the action and discretion of a municipal corporation as to divest public property from one public use to another public use within the limits of such corporation. We do not doubt that the Legislature might have directed the sale of the county stock in question, and appropriated the proceeds to the erection of a court-house, jail or hospital, or the purchase of a poor-farm within the county. Such action on the part of the Legislature would not have divested the title of the county to the stock, but would have changed the manner of its use. The proceeds of the sale would have remained the property of the county, and would have been appropriated to legitimate municipal and public purposes within the limits of the corporation. An additional extract from the opinion of Judge Denio, will conclusively show that the court did not intend to hold that property belonging to a municipal corporation could be appropriated to a private use. The learned judge says: "In one sense it may be conceded that it is taken for a public use; for when the state undertakes to indemnify the sufferers from riots, the execution of that duty is a public concern, and the expenditure is on public account. It is a public use in the same sense that the expenditure of money for the erection of court-houses and jails, constructions of roads and bridges, and the support of the poor. It is taken for an object which the Legislature has determined to be of public importance, and for the interest of the State." In our opinion the above case does not support the opinion of the majority of the court, but sustains the view taken by us.

The case of the State of Maryland *vs.* the Baltimore and Ohio R. R. Company, 3 How., 534, has but little application to the present case, for the reason that it was held that the payment of the million dollars was not a matter of contract, but was a penalty imposed by the State, and that, as the counties named had no vested right in the penalty named, it might be released by the State. There can be no doubt as to the power of the State to release a penalty. The power was not called in question in the above case, but it was conceded that if it was a penalty and not a vested right, *that* the state might release it.

In the case of East Hartford *vs.* the East Hartford Bridge Co., 10 How., 50, turned upon whether the ferry was held

by contract or license, and it was held that there was no element of contract or vested right. The learned judge was careful to distinguish the case from one where private property was involved. He says: "There is no private interest or property affected by this cause, but only public corporations and public privileges. It may be otherwise in case of private bodies or individuals, or of private property, granted or acquired. The Legislature might not be justified to make, transfer, or abolish them, on account of the private character of the party or the subject."

The case of the County of Richland *vs.* the County of Lawrence, 12 Ill. 1, is already distinguished from the present one. In that case the money was donated by the state to Lawrence County, to be expended in the construction of bridges and the repair of roads. Subsequently a part of Lawrence County was detached, and a new county formed of that and a portion taken from Clay County, and the Legislature directed that a portion of the money which had been paid to Lawrence County should be paid to Richland County, and expended therein in the improvement of roads and the construction of bridges, and the like. The effect of the act was to take from one county money which had been donated by the state, and direct the expenditure of the same for public purposes in another county, which had been in part formed out of the territory which had belonged to Lawrence County. This was not diverting public property to private use. The decision of the court was based upon the fact that the money had not been expended: The court says: "Before its expenditure, we cannot doubt that the Legislature had entire control over the fund, either to resume it altogether or to change the proposed purpose for which it was originally designed to be expended." The case of Dennis *vs.* Maynard, 15 Ill., 477, involved in substance the same question as in the preceding case, and was mainly decided on that case.

The case of the State *ex rel. vs.* the County Court, 34 Wis., 546, is very much in point in the present case, and very stronly supports the views expressed by us. The court says: "The funds of the county are not strictly private property They certainly do not belong to the citizens who may have contributed to them. They are rather public property, the property of the state, acquired from the people and property in the county, and to be used and

expended for the use and benefit of the same people and property." The validity of the law was sustained, because the money, which belonged to the county, was directed to be expended for a public purpose within the county. There was no attempt on the part of the Legislature to divert public funds to private use, as is done in the present case. The law, as we understand it to be, is stated with great clearness, accuracy and force, by the learned and very eminent jurist who delivered the opinion of the court, when he says: "Whilst the Legislature cannot take away from a county its property, it has full power to direct the mode in which the property shall be used for the benefit of the county."

The only question decided in Guinn *vs.* Weissenburg School Dist., 37 Pa. St. R. 433, having any application to the present case, is that the Legislature cannot impair the obligation of a contract, and to that extent is opposed to the opinion of the majority of the court.

The case of the Town of Milwaukee *vs.* the City of Milwaukee, 12 Wis., 93, deserves a more extended review than is given in the opinion of the majority of the court. The following extract from the opinion of the court has a direct and important bearing upon the question involved in this case. The court says: "The difficulty about the question is to distinguish between the corporation as a civil institution or delegation of merely political power, and as an ideal being, endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the Legislature; but in its capacity as owner of property designated for its own or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of Legislative interference or control, without the consent of the *corporation*, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body. It might sells its property, or the same might be lost or destroyed, and yet its powers of government would remain. In its character of a political power or local subdivision of government it is a public corpora-

tion; but in its character of owner of property it is a private corporation, possessing the same rights, duties and privileges as any other. This distinction is clearly laid down and established in the case of Bailey and Others *vs.* the Mayor, &c., of the City of New York, 3 Hill, 531, and authorities there cited. The inviolability by Legislative interposition of the rights and franchises of a private corporation, in case where there is not, by its charter, or the Constitution of the state by which it was granted, a reservation of power to repeal or modify, is demonstrated and established in the case of Dartmouth College *vs.* Woodward, 4 Wheat., 518, by a force of reasoning and power of argument to the strength and clearness of which nothing can possibly be added. It was there held that the charter of such a corporation was a contract, within the meaning of the first subdivision of section 10, article 1, of the Constitution of the United States, which declares that no state shall pass a law impairing the obligation of contracts. The same provision occurs in the 12th section of the 1st article of our State Constitution. The reasoning of that case extends as well to the power of the Legislature to interfere with the franchises, as with the rights of property of such corporations; but it is only with respect to the latter that it can be considered applicable to the question we are now considering, and there it is clearly so. Every argument used goes with equal force to prove that the Legislature has no power to divest a municipal corporation of its property previously acquired by purchase or otherwise. This want of power depends not upon the character of the corporation, but upon the nature of the right. The right to repeal or modify is not a right to interfere with vested rights of property. The power may exist without the latter. If the Legislature possessed both, the exercise of one would not depend on the other. How the total repeal of the charter of a municipal corporation, without provision as to the disposition of its property, (a circumstance not likely to occur,) would affect such property or the rights of its inhabitants, we are not called upon here to decide. It is sufficient that the corporation of the town of Milwaukee still continues to exist, and so long as it does so it is impossible to make a distinction between its rights of property and those of a corporation merely private. Both are, and ought in the nature of things to be, equally sacred.

In Terrett *vs.* Taylor, 9 Cranch, 43, the right of a state government to dispossess a private corporation of its property was directly passed upon and denied."

The same court in the subsequent case of the State of Wisconsin *ex rel.* &c., *vs.* F. X. Haben, Treasurer, &c., 22 Wis., 660, uses this language: "It is well settled as to all matters pertaining to vested rights of property, whether real or personal, and to the obligation of contracts, that municipal corporations are as much within the protection of the Federal constitution as private individuals are. The Legislature cannot divest a municipal corporation of its property without the consent of its inhabitants, nor impair the obligation of a contract entered into with, or in behalf of such corporation."

The case of Bailey *vs.* the Mayor, &c., 3 Hill, 531, was an action against the corporation of the City of New York for injuries occasioned by the negligent and unskilful construction of a dam on the Croton River, it appearing that the dam was a part of the work undertaken pursuant to the act for supplying the city with pure and wholesome water, and that it was built by persons employed for the purpose under a contract with the water commissioners. The liability of the city depended upon whether the water commissioners were the agents of the state or the corporation of the city. Mr. Chief-Justice Nelson, in delivering the opinion of the court, draws with great accuracy and clearness the line of distinction which exists between the powers of a Legislature over a municipal corporation in its character as a municipal or a public body and its character as a property owner. He says:

"The powers conferred by the several acts of the Legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment, under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city, as much so as the houses and lands belonging to it, situate within its corporate limits. The argument of the defendant's counsel confounds the powers in question with those belonging to the defendants in their

character as a mudicipal or public body, such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had not so much to the nature and character of the various powers conferred as to the object and purpose of the Legislature in conferring them. If granted for public purposes exclusiuely, they belong to the corporate body in its public, political, or municipal character; but if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred. (Dartmouth College *vs.* Woodward, 4 Wheat., 668, 672; Philips *vs.* Berry, 1 Ld. Raym., 8; 2 T. R., 352, S. C.; Allen *vs.* McKean, 1 Sumner, 297; The People *vs.* Morris, 13 Wend., 331, 338; 2 Kent's Com., 275, 4th ed.; U. S. Bank *vs.* Planters' Bank, 9 Wheaton, 907; Clark *vs.* Corp. of Washington, 12 id., 40; Moodalay *vs.* East India Co., 1 Brown's Ch. R. 469.)

"Suppose the Legislatnre, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which powers are conferred upon private companies; could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers, in the eye of the law, would be entirely distinct and separate from those appertaining to the defendents as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company, and be subject to the responsibilities attaching to that class

of institutions. The distinction is well stated by the master of the rolls in Moodalay *vs.* the East India Co., (1 Brown Ch. R. 469,) in answer to an objection made by counsel. There the plaintiff had taken a lease from the company, granting him the permission to supply the inhabitants of Madras with tobacco for ten years, Before the expiration of that period the company dispossessed him and granted the privilege to another. The plaintiff, preparatory to bringing an action against the company, filed a bill of discovery. One of the objections taken by the defendants was that the removal of the plaintiff was an incident to their character as a sovereign power, the exercise of which could not be questioned in a bill or suit at law. The master of the rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. 'They have rights,' he observed, 'as a sovereign power; they have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable. It is upon the like distinction that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. As such they are bound to repair highways, bridges, and churches; are liable to poor rates, and, in a word, to the discharge of any other duty or obligation to which an individual owner would be subject.' (2 Inst., 703; Thursfield *vs.* Jones, Sir T. Jones, 187; Rex *vs.* Gardner, Comp., 78; Mayor of Lynn *vs.* Turner, id., 87; Henly *vs.* Mayor of Lynn, 5 Bing. R. 91; 1 Bing. N. C., 222; S. C. in the House of Lords.")

In addition to the reference made in the opinion of the majority of the court to the case of City of Louisville *vs.* the Pres. and Treas., &c., *supra* we make the following extract from the opinion of the court:

"If, as reason and observation prove, and as the authorities referred to assume, a municipal corporation may acquire property which does not thereby belong to the state, and may appropriate it to uses which the state cannot defeat or control, it is not, in such acts of acquisition and appropriation, the mere instrument or agent of the government representing and acting for it; and these acts, though

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done under the authority of the law, cannot be regarded as acts of the state or its government, or as a part of its administration; nor can they of themselves impart that character to the object of the appropriation, nor subject it to a Legislative power, which did not attach either to the object of the appropriation or to the property itself before it was appropriated; but such property so far as the state is concerned, has all the attributes and is entitled to all the protection of private property."

Let us apply the principle above enunciated to the present case. Although the tax which was levied to aid in the construction of the railroad, was levied and collected in pursuance of law, it was collected from the property and polls of the county for the purpose of aiding in the construction of a work of public importance; yet when such aid has been rendered, the public purpose of the law was accomplished, and the stock which had thus been paid for became the property of the county, and, "so far as the state is concerned, has all the attributes and is entitled to all the protection of private property."

In the case of the Lousville, &c., R. R. Co. *vs.* the County Court of Davidson County, 1 Sneed, 637 no questions of contract or divesting vested rights arose or were decided by the court, for the reason that the original act provided that the stock should be issued to the tax-payers in proportion to the tax paid by them. If the subscription had been made in the name of the county and the stock issued to the county the question would then have arisen, as it does in this case, whether the Legislature could have taken the property of the county and given it to private citizens of the county.

Upon that point the language of the Supreme Court of Vermont, in Atkins *vs.* the Town of Randolph, 31 Vt., 266, is very appropriate. The court say:

"Since some early judicial notions of Chief-Justice Gibson, no judge or court has intimated that the property of one person could be taken without his consent and transferred to another, either with or without compensation, merely by force of Legislative enactment. In whatever form the question may arise, the uniform judgment of the courts of this country has settled that such would be unconstitutional and void legislation."

In the same opinion the following language is used:

"So far as a municipal corporation is endowed by law with the power of contracting, and as such is made capable of acquiring, holding, and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity, thus being invested with legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, to be ascertained and enforced by suit in the ordinary judicial forums, upon the same principles and by the same means as in case of a private corporation, such municipal corporation must stand on the same ground of exemption from Legislative control and interference as a private corporation."

In Touchard *vs.* Touchard, 5 Cal., 306, it is said:

"On the other hand, a corporation, both by the civil and the common law, is a person, an artificial person, and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affects its ownership of property, in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons."

We have arrived at a very different conclusion in respect to the weight and effect of the authorities bearing upon the constitutionality of the act in question, to what the majority of the court have. We think they satisfactorily and conclusively show that the act in question is unconstitutional and void.

A doubt is suggested in the opinion of the majority of the court as to whether the same principles of law apply to counties that do to cities. There is a difference as to the liabilities of counties and cities for injuries occasioned by the wrongful acts of the officers of such municipal corporations. The liability of cities is much greater than that of counties. But we have found no authority which holds that the Legislature has any greater power or control over the property of a county than it has over that of a city, and we know of no reason why any difference should exist.

Finally, it is said, in the opinion of the majority of the court, that the act, the validity of which is involved, is

eminently just and equitable, and the question is asked, what objection can be urged against it?

In answer to the question propounded, we urge the following objections:

First—In our opinion, the act is not only against natural right, but the spirit of the constitution, because it violates the obligation of contract and attempts to divest a vested right.

Second—It is an act of bad faith to such counties as have subscribed for stock in railroads in the name and for the use of the county.

Third—It is unfair to the voters of such counties as have imposed a tax upon their property and polls under the act of May 12, 1869, to aid in the construction of some railroad, and especially is such the case in reference to the county of Tippecanoe, for in that county the question, and the only one, submitted to the voters was whether they were in favor of subscribing for stock in the name of the county. The result of the vote might have been very different if the proposition voted upon had been that the voters should become stockholders in the railroad company in proportion to the amount of taxes paid, and that such stockholders should be individually liable for all labor done in the construction of said road that should remain unpaid after the assets of the corporation had been exhausted.

Fourth—The act in question is unfair and unjust to the creditors of the railroad company, because it provides that the persons who shall become stockholders, by virtue thereof, should hold the same relieved of any individual liability.

Fifth—The act in question will operate injuriously upon the railroad and upon the citizens of the county. When the county was the owner of the stock, her voice and vote exercised a controlling and healthy influence upon the management of the railroad, and inspired confidence in the community as to the completion of the enterprise and that its affairs would be safely and economically conducted. Laborers could be procured, because they could look to the individual liability of the largest stockholders for the payment of their wages. If the law is held valid and the stock is distributed among the tax-payers of the county, the amount held by most of the tax-payers will be too small to induce them to look after the management of the road, and especially as they are relieved of individual liability for the

debts of the railroad company. The result will be that in a short time the stock will be concentrated in the hands of a few men, who will pay but little therefor, and will exercise a controlling influence in the management of the railroad, relieved of all individual liability as such stockholders; or if the stock is retained by tax-payers, they will fail to vote, or if they do vote, they will be so divided in opinion that their influence will be neutralized if not destroyed. In either event, the effect cannot fail to be disastrous to the railroad and the prosperity of the county, so far as it depends upon the completion and successful management of such railroad.

Sixth—The act in question is a fraud and imposition upon the other stockholders. It is provided by section 38 of the railroad act of May 11th, 1852, that "the stockholders shall be individually liable for all labor done in the construction of said railroad that shall remain unpaid after the assets of the corporation shall have been exhausted." It is provided by the third section of the act of December 17, 1872: "That the stock so issued under the provisions of this act being involuntary in its character, no personal liability shall attach to the original holder thereof for any debt contracted by the railroad company." The effect will be, that while the other stockholders will be individually liable for the debts of the railroad, they may have their voice stifled and their influence in the management of the road destroyed by the voice and influence of stockholders who have no individual liability for the debts of the company. This will be unfair, unjust, inequitable, and disastrous to the railroad. The stockholders should all stand upon the same footing and be restrained and influenced by the same considerations and motives.

Seventh—In our opinion, all such legislation will have a demoralizing and deleterious influence upon the people of the State, because it teaches a disregard for the sacredness and binding force of contracts and obligations, and makes the purposes and interests of a few persons paramount to the best interest of the community.

Believing, as we do, that under the Constitution of the United States, and of this State, the Legislature is prohibited from divesting or attempting to divest, without its consent, a municipal corporation of its rights of property lawfully acquired, we have felt it to be our duty to so declare, and

to state our reasons for such convictions at considerable length.

In our opinion the judgment of the court below should be in all things affirmed.

Since the decision of the case by the Supreme Court of Indiana, the case of Spaulding *vs.* Andover, 54 New Hampshire, 38, has been decided in accordance with the views expressed in the foregoing minority opinion. We also call attention to the brief of plaintiffs on petition for rehearing. R. pp. 40, 41, 42 and 43.

The majority opinion was delivered by Downey, C. J., and is to be found in the printed record from pp. 9 to 20, inclusive. So far as that opinion asserts the doctrine that the Legislative control over the proprietary rights of municipal corporations is not limited by Section 10, Article 1, of the Federal Constitution, it is, we think, fully answered in the minority opinion. The case cited, Darlington *vs.* the Mayor of New York, 31 New York, 164, does not sustain the majority opinion. In that case Denio, C. J., expressly says: "It is unnecessary to say whether the Leg-"islative jurisdiction would extend to diverting the city "property to other public use than such as concern the city "or its inhabitants."

In the case at bar the title to the stock in controversy, is diverted from the county and its inhabitants, and vested in tax-payers in unequal amounts, practically excluding the majority of the inhabitants from all participation. The plaintiffs did not hold the stock in question for a public use, as a court-house, jail or asylum for the poor is held, but as private corporations hold property. The force of this distinction is pressed in the minority opinion. In the majority opinion, attention is called to the 2d section of the act of December 17, 1872, which provides "that where "taxes have been, or shall be levied in accordance with the "the said act, (the act of May 12, 1869,) which shall here-"after be paid, the treasurer of the proper county, shall

"give to the person paying such railroad tax a special re-
"ceipt therefor, in which the facts shall be stated," from which an argument is sought to be drawn, that the stock purchased with such taxes did not "thereby become the "property of the county in the sense that it would if pur-"chased with county funds." This proposition is answered in the minority opinion. In addition to what is said in the minority decision, I add the following suggestions: The plaintiffs acquired the stock in controversy, in their corporate name and capacity, not under the act of December 16, 1872, but under the act of May 12, 1869, Under the latter act the stock was subscribed and paid for and the money, necessary for that purpose, raised by *taxation*, as for a public purpose. Whether a contract was thereby made which has been violated, by the act of December 17, 1872, the construction of the act of May 12, 1869, is, alone, involved. In the decision of this question the rule does not apply that the construction given by state courts to state laws and constitutions are binding and conclusive upon the Federal courts; for the appellate jurisdiction of this court, in such cases, would be of no avail if it could not decide, independent of all adjudication of the Supreme Court of a state, whether or not, in a given case, the statute or instrument, was expressive of a contract.

Speaking to this question, this court in the case of Jefferson Branch Bank *vs.* Kelly, 1 Black, 436, said: "It "has never been denied, nor is it now, that the Supreme "Court of the United States, has an appellate power, to re-"verse the judgment of the Supreme Court of a state, "whenever such a court shall adjudge that not to be a "contract, which has been alledged in the forms of legal "proceedings, to be one, within the meaning of the clause "of the Constitution of the United States, which inhibits "the states from passing any law, impairing the obligation "of contracts. Of what use would the appellate power be "to the litigant, who feels himself aggrieved by some par-

"ticular state legislation, if this court could not decide in-
"dependently of all adjudication by the Supreme Court of
"a state, whether or not the phraseology of the instrument
"in controversy was expressive of a contract, and within
"the protection of the Constitution of the United States. **
"It never was intended and cannot be sustained by any
"course of reasoning, that this court should or could, with
"fidelity to the Constitution of the United States, follow
"the construction of the Supreme Court of a state in such
"a matter, when it entertained a different opinion."

This question was again considered by this court in the case of Bridge Proprietors *vs.* Hoboken Co., 1 Wallace, 116, and the views expressed, in the above cited case, from 1 Black, fully affirmed. The act, which is really the subject of construction in this case, is the act of May 12, 1869, under which the plaintiffs claim, for if that act and the proceedings under it, by which the plaintiffs acquired the title to the stock in controversy, amounted to a contract, then the act of December 17, 1872, attempting to divest the plaintiffs of their title to that stock must be void as impairing that contract. No doubt can be entertained that it was the intention of the framers of the latter act, in contravention of the rights acquired by the plaintiffs under the act of May 12, 1869, to divest the plaintiffs of their title to the stock in controversy, and bestow it upon private parties, in unequal proportions who might, or might not be inhabitants of the county. The act complained of as impairing the obligation of a contract, protected by the Federal constitution, does not condem the property in controversy to a *public use*, but appropriates the psoperty of the plaintiffs to private persons. It is an attempt to exercise a power not inherent in Government, even in its most despotic forms. Burlemaque's Elementary Principles of Public Law, pp. 145-150, secs. 26, 7, 8, 9.

The exercise of this power is not, *hac verba,* forbiden either in the Federal constitution, or in the Constitution of

the State of Indiana, but nevertheless it is generally understood that the Legislatures of the states have not the power to bind the subject by such laws. Bishop's First Book of the Law, p. 90, sec. 90. It is generally understood that the exercise of such a power is sufficiently guarded against by Section 10, Article 1, of the Federal constitution, *and by the genius of our institutions.* The plaintiffs having acquired the property in controversy, under and in accordance with a public law, the public faith was thereby pledged that they should hold and enjoy it. Hence, in the above cited case of Dartmouth College *vs.* Woodward, *Justice Story*, speaking of municipal corporations, such as towns, cities and counties, says: "But it "will hardly be contended that even in respect to such "corporations the Legislative power is so transcendent, "that it may at its will, take away the private property "of the corporation, or change the use of its private funds "acquired under the *public faith.* * * * From the very "nature of our Government, the public faith is pledged "the other way, *and that pledge, constitutes a valid compact;* "*and that compact, is subject only, to judicial inquiry, con-* "*struction and abrogation.* This court *have already had oc-* "*casion*, in other cases, to *express their opinion on this sub-* "*ject and there is not the slightest inclination to retract it.*"

Cooley on Const. Lim. p 235.

For these reasons, it is respectfully submitted, that the judgment of the Supreme Court of Indiana should be reversed.

Z. BAIRD,
Of Counsel for Plaintiffs.

Supreme Court of the United States

October Term, 1875.

No. 234.

The Board of Commissioners of the County of Tippecanoe, Indiana, Plaintiff in Error, *v.* Martin Lucas, Treasurer, &c. Defendant in Error.	Error to The Supreme Court of the State of Indiana

Brief of Defendant in Error.

SPRING & ROBERTSON, PRINTERS & BINDERS, LAFAYETTE.

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1875.

The Board of Commissioners of the County of Tippecanoe, *v.* Martin Lucas, Treasurer, &c.	Error to The Supreme Court Of Indiana

By the Act of May 12, 1869, County Boards in Indiana were authorized, upon the affirmative vote of a majority of the legal voters of their respective counties, to levy special taxes upon the taxable property,—(*not polls*)—in each County to aid in the construction of railroads through the same, and upon the collection of such special taxes were directed to subscribe and pay therefrom for stock to be issued to the County in the companies so engaged in such construction.

Pursuant to the act the Plaintiff in Error, having levied and collected such a special tax, during the years 1871, 1872 and 1873, subscribed and paid from the moneys thus raised for 6610 shares of $50 each, in the LaFayette, Muncie and Bloomington Railroad Company, in all $330,500.

On the 17th of December, 1872, the legislature of the State passed an act purporting to divest Counties of the stock in railroad companies thus purchased and paid for, and bestow it upon the persons who had paid such special taxes thus invested in stock, or their assigns, provided they applied for their respective portions within a limited time, and vesting what stock should not be applied for in the several townships of such counties for the benefit of the public common school fund.

The material parts of these acts will be found in the brief of plaintiff in error at pp. 5, 6, 7.

In July, 1873, Lucas, the defendant in error, being treasurer of said County, in obedience to the requirements of the act of December, 17, 1872, was engaged in issuing certificates to tax payers of the amounts by them respectively paid, for presentation to said railroad company upon which certificates of stock were issued to such tax payers.

The Board of Commissioners thereupon applied to the Judge of the Tippecanoe Circuit Court in vacation for an order of injunction against the further issue of such certificates by Lucas as treasurer, which was granted, and from which he immediately appealed to the Supreme Court of the State. These proceedings were all in accordance with the Indiana practice. The Supreme Court reversed the judgment, "with instructions to dismiss the complaint."

To reverse this judgment of the Supreme Court this writ of error is prosecuted.

I.

Is the judgment of the Supreme Court of the State of Indiana to which the writ of error is prosecuted, *final*, so as to give this court jurisdiction?

We suggest that it is not, but prefer that this suggestion shall be held untenable as, if sustained, it will delay the adjudication of the main question in this court until there can be a formal trial, and final judgment in the case in the Circuit Court and an appeal therefrom to the Supreme Court, to the final judgment of which a new writ of error must be prosecuted. We desire to meet the case upon its merits now, if there is jurisdiction in this court upon the present record to hear and decide it. While we have not been able to find an authority precisely in point, we refer to *Virden vs. Colem in*, 18 How. 86, as bearing strongly upon the question. In that case a temporary injunction was dissolved and the order dissolving it was appealed from to the Supreme Court of the State, where the action appealed from was affirmed, and to that judgment of affirmance a writ of error was prosecuted, and this Court held that it acquired no jurisdiction. In the case at bar an interlocutory order of the judge made in vacation was appealed from, the case itself still remaining in the State Circuit Court. The Supreme Court of the state reversed the interlocutory order of injunction. This was all that was before that court and all of which it had any jurisdiction.

The complaint of the plaintiff in error will be found in the transcript at pp. 3 and 4, and the allegations and the prayer thereof clearly show that an injunction was asked of the judge in vacation to operate until a hearing could be had in term time, when the plaintiff in error prayed that the injunction should be made perpetual. It is thus apparent that the only matter before the State Supreme Court was the legality of the ruling of the judge at Chambers; and although both he and the Supreme Court passed upon the constitutionality of the law, and the latter ordered the complaint to be dismissed, the question still remains, is the judgment of the Supreme Court upon an appeal from an interlocutory order, final where there has never been a final hearing in the inferior court which has been appealed from? See also

Butterfield vs. Usher, in this Court, October Term, 1875, in which it is held that an appeal will not lie from a decree rendered by the Supreme Court of the District of Columbia, which finally disposed of a motion in the case but not of the case itself.

II.

The act of the General Assembly of Indiana of December 17, 1872, bestowing the stock purchased by the plaintiff in error with the proceeds of the special tax raised under the act of May 12, 1869, upon the payers thereof, is not in conflict with the provision of the Constitution of the United States which declares that "no State shall pass any law impairing the obligation of contracts."

It is conceded that the ruling of the Circuit Judge was based upon his opinion that to hold the act in question valid would impair the obligation of the contract between the plaintiff in error and the LaFayette, Muncie and Bloomington Railroad Company, whereby the latter upon receiving the money therefor, sold and delivered, so far as the same was susceptible of delivery to the former, the stock in question. If this would be the operation of the act it must of course be held void, because in conflict with Article 1, Section 10, of the Constitution of the United States, prohibiting such legislation.

But we insist that the theory of plaintiff's counsel and the opinion of the Circuit Judge and of the dissenting Judges, Pettit and Buskirk, of the Supreme Court, are erroneous.

1. The contract between the railroad company and the plaintiff in error was executed when the money was paid and the entry made upon the railroad company's books showing how much of the capital stock was purchased and paid for by the County Board. The issuing of a certificate therefor was not essential to make the County the owner of the stock.

Ang. and Ames on Corp. § 565; *Railroad Company vs. McCormick*, 10 Ind. 499; *Railroad Company vs. Peirce*, 28 Ind. 502; *Beckett vs. Houston*, 32, Ind. 393.

The obligations of the railroad company under this contract were those which are imposed by law upon every private corporation to its stock-holders, and the rights secured to the plaintiff in error were those which the law gives to every person purchasing and paying for stock.

One of the essential qualities of this stock is that it is personal property transferable upon the books of the railroad company at the option of the holder. This is the law of the state of Indiana upon the subject. 1 Gavin & Hord's Stats. 508, § 10. Now if the statute in question shall have its intended effect, it will be to transfer this County stock to the persons whose money was taken by taxation to purchase it. The railroad company will not profit by the transfer, and its obligations in regard to the stock are in no wise changed, modified or impaired; they will still exist in full force in favor of the several tax payers or, in default of their applying for the stock, in favor of the several Townships of the County for public school purposes. If the legislature had attempted to annul the transaction and allow the railroad company to keep the money paid, divest the County of the stock and reinvest the company with it, there would have been plausible grounds upon which to argue that the act was obnoxious to the objection of impairing the obligation of contracts. Story on Const. § 1376. Still, as we shall attempt to show under the second point in this brief, we do not believe that even such an act, when applied to *County* stock, would be unconstitutional.

It was the evident intention therefore, of the Indiana legislature, by the act of December 17, 1872, to *transfer* the stock of the plaintiff in error to the parties whose money paid for it, and not in any way to affect the obligation between the railroad company and its stock-holders. Those obligations in the first place were to pay to the plaintiff in error its

just proportion of the net earnings or profits of the business, and allow it to vote the stock at all meetings of stock-holders. Ang. & Ames on Corp. §§ 556, 557, *et seq.* Such payments are still to be made, and such rights to vote still recognized and admitted by the railroad company, but not in favor of the County. Ang. & Ames on Corp. § 113.

There is, therefore, we submit, no warrant for the position that the act in question, if held valid, will impair the obligation of the contract between the County and the Railroad Company.

It is evident that if the Act was designed to operate upon the stock of a natural person, and transfer it without his consent, it would be void because in conflict with that clause of the fifth amendment of the Constitution of the United States which declares that no person shall "be deprived of life, liberty or property without due process of law." But this provision is only for the protection of the citizen, and has no application whatever to corporations, and there is nothing in the Federal Constitution limiting the power of the State Legislatures over municipal corporations or their property.

2. The Act of the Legislature of the State of Indiana in divesting the County of Tippecanoe of this Railroad stock and bestowing it upon the several tax-payers in proportion to their contributions to purchase it, does not contravene any of the provisions of the Constitution of the United States, and the record therefore presents no question of which this Court has jurisdiction.

We might well content ourselves with the showing, as we think we have, that the act is not invalid upon the ground that its effect will be to impair the obligation of contracts, but we also insist that its provisions are clearly within the well defined and firmly settled powers of the State Legislature.

The much controverted question of the constitutionality of laws levying taxes for aiding in the construction of railroads has been determined in favor of such laws upon the sole ground that the roads are constructed for a public use, and not because investing in stocks which may earn dividends, is within the purposes for which the taxing power may be exercised. The public purpose authorizes the tax in such cases, and the acquisition of the property in the stock by the municipality is the mere incident of the exercise of the taxing power, and not the foundation of it. Cooley on Taxation, 94–98. *Loan Association vs Topeka*, 20 Wall, 655.

The plaintiff in error is really the County of Tippecanoe, for "in legal contemplation the Board of Commissioners is the County." Per Stuart, J., in *The State vs. Clark*, 4 Ind. 315. "Counties are at most but local organizations which, for the purpose of civil administration are invested with a few functions characteristic of a corporate existence. They are local subdivisions of a state created by the sovereign power of a state of its own sovereign will, without the particular solicitation, consent or concurrent action of the people who inhabit them." *Hamilton Co. vs. Mighels*, 7 Ohio St. 109; Dillon on Mun. Corp. §10. "Counties in Indians are *quasi* corporations, and possess the same powers as counties in Ohio." Per Pettit and Downey, JJ. in *Hayward vs. Davidson*, 41 Ind. 212.

The plaintiff in error then being a *quasi* corporation created for a particular purpose by the legislature, having been granted the necessary power, raised money by taxation and took the stock in question, not for the purpose of holding it as productive property but merely to advance a public purpose,—to aid in the construction of a railroad for the public good. Now it is apparent that the management of the affairs of a railroad company is no part of the proper business of a county, and public policy required that when the railroad was built it should be run and operated under the control of men,—not politicians,—who have a personal pecuniary interest in its

success. The Legislature, acting upon this theory, determined wisely, as it appears to us, to take this stock from the *quasi* corporation in which it had never been vested for the purpose of being held as property, and bestow it upon the persons who had been compelled under the law to pay for it. Has the Legislature such power?

It would seem that this question can have but one answer, and that is implied in the power it has to create and control counties and their property and do justice to the citizens and the tax payers.

Suppose for illustration, that a County is authorized by special act to raise money by taxation and use it for the construction of a railroad, but after the taxes levied are partly paid a private corporation builds the contemplated railroad, and the legislature revokes the authority by a repeal of the law and by the repealing act directs the taxes already paid to be refunded to those who have paid them. Can there be any doubt that such an act of justice in refunding money which had become the property of the County, but which is no longer needed for the purpose for which it was taken from a part of the tax payers, and bestowing it upon those who had paid it into the treasury, would be constitutional?

Just such legislation, in principle, has taken place in Indiana.

In 1852 many townships in Indiana voted taxes for school houses and school purposes generally, which the Supreme Court adjudged illegal and void. It was held that these illegal taxes *voluntarily* paid, could not be recovered back from the treasury. *Martin vs. Stanfield*, 17 Ind. 336; *Lima Tp. vs. Jenks*, 20 Ind. 301. Voluntary payment of such taxes, therefore, made the money belong absolutely to the County, but of course it was unjust to retain it from the tax payers. The legislature, moved by this consideration of justice to its citizens who had promptly paid without litigation, passed a law requiring such illegal taxes to be refunded. Acts of 1853, p. 131.

This act was never adjudged unconstitutional or its legality questioned, and we do not suppose that any lawyer ever doubted its justice or its constitutionality, yet it is precisely like the act of December 17, 1872, in principle, and if the law was valid which refunded the taxes illegally assessed but voluntarily paid, whereby they became absolutely the property of the County, then the law which provides for the tax payers to obtain the stock. which their money has paid for, is also valid.

Instead of prolonging this argument we refer the Court to the able and exhaustive opinion of the majority of the State Supreme Court in this case, pronounced by Judge Downey, which will be found in 44 Indiana Reports, pp. 525–545, and in the transcript in this case at pp. 9–20, and the authorities there cited.

It is true there are some *dicta* of learned judges which seem to support the plaintiff in error, and they have been quoted or cited by the counsel upon the other side, but we desire to call the attention of this Court to the remarks of Judge Downey in reference to them on pages 540 and 541 in 44 Indiana, and on pages 18 and 19 of the transcript.

Judges and law-writers have not always carefully discriminated between the ample if not unlimited power of the legislature over *municipal* corporations and their property, and those constitutionally limited powers which they possess over private corporations and their property. The loose and general expressions by way of illustration or otherwise which have been employed by judges while deciding questions involving the rights of private corporations, have been adopted without reflection as the law in other cases where the effect of legislation upon municipal rights was under consideration, and losing sight of the important differences between the nature and objects of the two classes of corporations, some courts, especially those in Wisconsin and New Hampshire, have in effect decided that a small portion of the State which has been formed into a political corporation for public

purposes only, may become superior to, and independent of, the State itself in the matter of the property which it has acquired only by a grant of power to tax citizens within its territorial limits. Suppose the State of Indiana had passed an act requiring the plaintiff in error to sell the stock in question, can there be any doubt that such act would have been constitutional? It seems to us not; and yet, if the right to the stock held by the County was by a contract which could not be impaired by the legislature, it must follow, if the arguments upon the other side are sound, that such an act requiring a sale would have been void. If the County held the stock under a contract protected by the Constitution of the United States, the State of Indiana could have exercised no control over the stock or the contract under which it was held. This doctrine would clothe Counties with rights and powers in regard to property, which the State, their creator, would have no power to modify or change. The case of *Spaulding vs. Andover*, 54 N. H. 38, cited upon the other side, presented facts quite different from those under consideration. Spaulding had contributed nothing to the fund of the township which he sought by his suit to reach, and he had no moral claims to it. In that case FOSTER, J., placed great stress upon the language of Judge Story in *Terrett vs. Taylor*, 9 Cranch. 43: "In respect to public corporations, which exist for public purposes, such as counties, towns, cities, &c., the legislature may under proper limitations, have a right to change, modify, enlarge or restrain them, *securing however, the property for the uses of those for whom and at whose expense it was originally purchased.*" Now we submit that the act of the Indiana legislature does literally secure the property for the use of those "at whose expense it was originally purchased;" that is, having secured the building of the railroad, the stock is turned over for the use of the tax payers whose enforced contributions in money originally purchased it. In the Spaulding case the effect of the act would have been, if held valid, to take the money from the town, and give it to a party "at whose expense it was" not "originally purchased."

We submit that the true doctrine on this subject is announced by the majority of Judges of the Supreme Court of Indiana in this case and believe that this Court will so decide.

The following authorities are cited as sustaining the power claimed by defendant for the legislature of Indiana to take the railroad stock of the plaintiff in error and vest it in the tax payers.

Darlington vs. Mayor, &c. 31 N. Y. 164.
Lycoming vs. Union, 15 Penn. St. 166.
Grim vs Weissenbery, 57 Penn. St. 433.
Philadelphia vs. Fox, 64 Penn. St. 169.
County vs. County, 12 Ills. 1.
Dennis vs. Maynard, 15 Ills. 477.
Love vs. Schenck, 12 Iredell, 304.
Louisville, &c. R. R. Co. vs County Court, &c. 1 Sneed. 637.
Sharp vs. Contra Costa Co. 34 Cal. 288.
State vs. St. Louis Co. 34 Mo. 546.
City of Augusta vs. North, 57 Maine, 392.
Wade vs. Richmond, 18 Grattan, 583.
State vs. Votaw, 8 Blackf. 2.
Sloan vs. State. 8 Blackf. 364.
State Bank vs. Madison, 3 Ind. 43.
Goodrich vs. Winchester, 26 Ind. 119.
Maryland vs. Baltimore & Ohio R. R. Co. 3 How. 534.
East Hartford vs. Hartford Bridge Co. 10 How. 511.
Mulligan vs. Corbins, 7 Wall. 487.

The spirit of these authorities is that:—Counties, being political organizations for public purposes, are under complete control of the State, and within the expressed

limitations of constitutional restrictions, the legislature may deal with them and their property as it deems wise and expedient.

We respectfully ask that the judgment of the Supreme Court of Indiana may be affirmed.

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H. W. CHASE,

Of Counsel for Defendant in Error.